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Bombay High Court Reports.

VOLUME IV.

K. J. RUSTON.

REPORTS OF CASES

DECIDED IN THE

indicture

HIGH COURT OF BOMBAY.

1866-67.



EDITED BY

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R. T. REID, LL.D., BARRISTER AT LAW.

CHARLES F. FARRAN, B.A., BARRISTER AT LAW.

Appellate Civil Jurisdiction.

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KHANDERA'V CHIMANRA'V BEDA'RKAR, B.A., LL.B.

GIRDHARLA'L DAYA'LDA'S KOTHA'RE, B.A., LL.B.

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ERRATA ET ADDENDA.

| Page | |
|------|---|
| 2 | O.C.J. Line 30 from top of page, for "Vurnamoye" read "Sur-namoye." |
| 14 | ," In note (r) after "11 Q. B. 916" add "and see <i>Doe d. Hurreehur Dutt v. Isaac</i> , Montrou R. 17." |
| 24 | ," <i>In notis</i> , for "(g) Ibid., 323, 324, 325," read "(g) 1 Moo. Ind. App. 305," and for "(h) Moo. Ind. App. 305," read "(h) Ibid., 323, 324, 325." |
| 40 | ," At the end of note (h) add "and note (r), page 103, <i>infra</i> ." |
| 64 | ," Line 21 from top of page, for "(p)" read "(q)," and at line 28 for "(q)" read "(r)." |
| 88 | ," Line 32 from top of page, add "and see <i>Webbe v. Lester</i> , 2 Bom. H. C. Rep. 55." |
| 92 | ," Lines 27 and 28 from top of page, for "or more frequently to him," &c. read "or more frequently, during the latter portion of that period, to him," &c. |
| 98 | ," Line 1, for "no distinction etween" read "no distinction between." |
| 103 | ," Note (s), for "and the reversion, instead of being in the Company, was in the tenants," read "and instead of the reversion being in the Company, the fee was vested in the tenants." |
| 129 | ," Line 8 from top of page, for "plaintiff" read "defendant." |
| 130 | ," Line 6 from bottom of page, for "commentated" read "commented." |
| 133 | ," Line 15 from bottom of page, for "Act XXIV. of 1864" read "Act XXVI. of 1864." |
| 141 | ," Line 4 from top of page, for "defendant" read "defendants." |
| 169 | ," In heading, omit "of 1867." |
| 189 | ," Line 9 from top of page, for "purchase" read "purchases." |
| 190 | ," Line 9 from top of page, after "Phoenix Life Ins. Co." add "In re." |
| ," | ," In note (s) for "1 L. R. 593" read "L. Rep. 1 Eq. 593." |
| 199 | ," Line at top of page, for "7th" read "2nd." |
| 200 | ," Line 11 from top of page, for "the financial corporation" read "financial corporations." |
| ," | ," Line 7 from bottom, after "Walker v. Symonds" add "(3 Swan. 64)." |

ERRATA ET ADDENDA.

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10 A.C.J. At the end of note (b) add "3 Grant Duff Hist. Mahrattas, Index, Title Jagir, and pp. 248, 351; and *Ibid.*, Vol. I., pp. 326, 327.

27 , At the end of note (e) add "Acc. *Hurkoonwar v. Ruttunbaee*, 1 Borr. 475."

38 , Line 26 from top of page, for "imvestigate" read "investigate."

79 , In heading, for "Act XIV. of 1864" read "Act XVI. of 1864."

93 , In heading, line 2, for "Reg. II. of 1867" read "Reg. II. of 1827."

115 , Line at bottom, after (Domat, Vol. I., Book 1., Tit. 28 : 2' insert full point.

142 , In note, line 7 from bottom, for "Register" read "Registrar."

146 , Line 36 from top of page, for "Sadr" read "Sudder."

199 , Line 10, from bottom, for "majority" read "minority."

205 , In footnote for "2 L. R. Eq. 795" read "L. Rep. 2 Eq. 795."

16 Cr. Ca. Line 16 from top of page, for "Ohphant" read "Oliphant."

21 , Line 7 from top of page, for "There" read "Here."

S. D. Abbott.

K. J. RUSTOMJI

CASES

DECIDED IN THE

ORIGINAL CIVIL JURISDICTION

OF THE

HIGH COURT OF BOMBAY.

Original Suit No. 228 of 1864; Appeal No. 19.

164
1867.
August 1.

NA'OROJI BERA'MJI *Defendant and Appellant.*

HENRY ROGERS and others,

trading in Bombay and

Puná as Rogers and Co. *Plaintiffs and Respondents.*

Agreement for renewal of lease—Specific performance—Pársis—Jus mariti—Mortgage—Immoveable property in Bombay—Lex Loci—Introduction of English law into India—Royal Charters and Letters Patent—Portuguese—Treaty of 1661—Aungier's Convention—Feudal tenures—Manor of Mazagon—Emphyteusis—Conveyancing and tenures in Bombay—Act IX. of 1842—Act VI. of 1851 (Foras Lands)—Act IX. of 1837.

Immoveable property situated in the Island of Bombay conveyed in 1859 to N. and his wife (Pársis), their heirs, executors, administrators, and assigns, was subsequently mortgaged by N. and his wife, but the mortgagee did not enter into possession. Afterwards, in 1861, N. alone entered into an agreement with the plaintiffs to give them a lease of that property for five years, the plaintiffs being willing to accept that lease with such title as N. could confer:—*Held* that, notwithstanding the non-concurrence of the mortgagee and of N.'s wife, N. must specifically perform his agreement.

Held also that it was unnecessary, under such circumstances, to consider whether the estate of N. and his wife in the property were chattel real, or real estate: for, if it were chattel real, N., by his marital right, according to English Law (which in this case applied), might dispose, either wholly or in part, of her interest; and if the property were realty, the lease by N. would at all events bind her for the term of five years, if N. should so long live.

Assuming the property to be realty, *Semblé* that on N.'s death before the expiration of the term of five years, the lease would, as against the wife surviving, be voidable only, and not void.

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NÁ'OROJI
BERÁ'MJI
v.
ROGERS.

The non-concurrence of the mortgagee could not prevent the right of the plaintiffs to a specific performance by N. of the agreement, because N. should either himself redeem the mortgage, or permit the plaintiffs to do so.

The proposition, laid down by the Judge of the Division Court, *that all immovable property in Bombay was of the nature of chattel real, and that there was not any property of the nature of freehold or inheritance in that island*, disapproved of and denied, as being irreconcilable with Royal Charters, Acts of Parliament and of the Legislative Council of India, decisions of the Courts both in India and England, and the tenures of land and practice of conveyancers in Bombay.

The tenure of land in Bombay under the Portuguese was of a feudal character.

Creation and tenure of the ancient Manor of Mazagon described.

Doctrine that the fief of the Middle Ages has sprung from the Roman tenure in *emphyteusis*, mentioned.

Ceremonies of enfeoffment and livery of *seisin* in Bombay.

The nature and results of Governor Aungier's Convention stated; and the origin of "pension and tax" in Bombay traced.

Treaty of the 23rd of June 1661 between Charles II. and the King of Portugal considered.

The treaty in 1664-65 by Mr. Humphrey Cook with the Viceroy of Goa was entered into without authorisation by the Crown of England or the Crown of Portugal,—was not ratified by either,—was expressly repudiated by the former, and never was of any force.

Doe d. de Silteira v. Texeira, 2 Mor. Dig. 250, observed upon.

Lex Loci Report of the Indian Law Commissioners, and the introduction of English law into India, discussed.

Distinction taken, with reference to the observations of Lord Kingsdown as to Calcutta in the *Advocate General v. Ranee Vurnamoye Dossee* (9 Moo. Ind. App. 425,426), between Bombay, which was held by the English in full sovereignty, and Calcutta, which was merely held by them as a factory.

Statement of the circumstances which led to the passing of Stat. 9 Geo. IV., c. 33 (Fergusson's Act), and also of those which led to the passing of Act IX. of 1837 (relating to the immovable property of Pársis).

THIS was an appeal from a Decree made on the 3rd of November 1864 by Mr. Justice Hore, then an Acting Judge of the High Court.

The suit was for the specific performance of an agreement for the renewal of a lease of a house and premises within the Fort in the island of Bombay.

The plaint stated that by an indenture of lease, dated 4th October 1859, made between Hirjibhái Hormasji Seṭná of the first part, the defendant, Náoroji Berámji, and A'ímáye, his wife, of the second part, and the plaintiff Henry Rogers of

the third part, the remises in question were demised to Henry Rogers from the 1st of May 1859 for a term of five years thence next ensuing, subject to certain rent and covenants ; that at the time of granting that lease the demised property was subject to a mortgage to Hirjibhái Hormasji Seṭná, and that he joined as mortgagee in the lease ; that Henry Rogers entered upon the demised premises, and by himself and his partners continued to occupy the same. The plaintiff next averred an agreement, on the 22nd of April 1861, by the defendant, Náoroji Berámji, with the plaintiff Henry Rogers, to grant to him a renewed lease of the premises for a further term of five years, from the expiration of the lease above mentioned, at the same rent and under the same conditions. That agreement was contained in the following correspondence. On the 8th of March 1861 the defendant wrote to Mr. H. Rogers as follows :—

“ With reference to what you spoke to me the other day, I beg to inform you that I shall be greatly delighted to allow you to occupy the house as a tenant for a further period after the expiration of the term specified in the present lease, under the very same conditions : provided you agree to do so, and write me to that effect as soon as you conveniently can.”

The plaintiff's, Rogers and Company, replied as follows :—

“ In reply to your note of this day's date to our Mr. Rogers, we agree to renew the lease of the house, belonging to you and at present in our occupation, for a further term of five years on the expiration of the present lease ; and, to prevent any further misunderstanding, we would be glad if you confirm the terms in writing, say for a further term of five years, on the expiration of the present lease, at the same rent and the same conditions on which we hold the house by the present lease. This we shall be glad to have at your earliest convenience, and before declining a house that we now have the refusal of.”

The defendant, by letter dated 22nd April 1861, addressed to plaintiff Henry Rogers, replied as follows :—

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"With reference to yours to me dated 8th March 1861, I beg to state that I agree to the terms you propose for the renewal of the lease, viz., for a further term of five years on the expiration of the present lease, at the same rate of rent and under the same conditions."

The plaint also stated that at the time of that agreement the firm of Rogers and Company consisted of the plaintiffs; and that they were willing that the renewed lease, to be granted by the defendant, should be granted either to the plaintiffs, or to the plaintiff Henry Rogers alone.

It further stated that they had lately required the defendant to perform his contract, and that, though he expressed his willingness himself to execute a renewed lease, he had wrongfully refused or neglected to procure the concurrence of the mortgagee, and of the defendant's wife, A'imáye; that they, the plaintiffs, did not know the precise nature of her interest in the premises, but contended that the defendant ought to procure, in the renewed lease, the concurrence of the mortgagee and A'imáye; and, lastly, stated that the plaintiffs were willing, if necessary, to redeem the mortgage.

It prayed that the defendant should be decreed specifically to perform his contract, or, if unable to do so, to pay to the plaintiffs, or to the plaintiff Henry Rogers alone, damages to the extent of Rs. 60,000 for breach of contract.

The defendant, in his written statement, did not deny that he had entered into the agreement; but stated that by indenture of the 12th of February 1859, in consideration of Rs. 23,075 and reas 33, then paid by defendant and the said A'imáye to the grantors in that indenture, they "did grant, bargain, sell, assign, and convey, and *also, by virtue of Act IX. of 1842 of the Legislative Council of India, release and confirm to the defendant and A'imáye his wife, their heirs, administrators, executors, and assigns, the said house and premises, to have and to hold the said land, messuage, hereditaments and premises, &c., unto, and to the use of, the defendant and A'imáye his wife, their heirs, executors, administrators, and assigns, for ever.*" That deed was produced. The grantors were Jáiji, widow, and Dhanjibhái Sorábji

Nárelválá and Návajbái, his second wife, all described as Pársi inhabitants of Bombay. It commenced the recital of the title as in Kharsedji Jiváji Ghándi, also a Pársi inhabitant of Bombay, who died on the 19th of December 1834, "seized and possessed" of the house and premises in question and other property. He left surviving him a widow, A'vábúi, one son, Mánékji, and four daughters,—the said Jáiiji, widow, Dínbái, first wife of the said Dhanjibhái Sorábji Nárelválá, the said Návajbái, his second wife, and the said A'imáye, the wife of the defendant. Mánékji died on the 17th of November 1839, intestate and without issue. Bhikájji, the widow of Mánékji, for valuable consideration, released all her claims against the estate of her husband, Mánékji, or of his father the testator, to A'vábúi, to whom administration *cum testamento annexo* of the goods, chattels, rights, and credits of the testator was granted, on the 24th of February 1835, and of his son, with the consent of Bhikájji, on the 15th of January 1845. By certain other recitals, to which it is unnecessary further to refer, it appeared that A'vábúi died on the 21st of April 1850, leaving her daughters Jáiiji, Návajbái, and A'imáye "her heirs and next of kin surviving her," and administration of her goods and effects was, on the 20th of April 1858, granted to Jáiiji, and administration *de bonis non* of the goods and effects of the testator, Kharsedji Jiváji Ghándi, on the 17th of January 1859. Bhikájji and her second husband, one Jamsedji Pestanji Pánde, granted a fresh release to Jáiiji of any claim which they might have to the estates of the testator, Kharsedji, his son Mánékjí, or A'vábúi. Subsequently it was agreed that the property of the testator should be divided into three equal parts, amongst Jáiiji, widow, Dhanjibhái Sorábji, and Návajbái his wife, and Náoroji Berámji (the defendant), and A'imáye his wife; and that in part performance of that agreement the house and premises should be sold to the defendant and A'imáye his wife for Rs. 50,000, and they should pay to Jáiiji, Dhanjibhái Sorábji, and Návajbái Rs. 23,075-0-33, being the difference between the price of the house and the one-third share of the estate of the testator, to which defendant and his wife were entitled, under the recited agreement. To carry out that

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v.
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v. *ROGERS.* The written statement also stated that, by an indenture of the 14th of February 1859, the defendant and A'imáye his wife mortgaged the premises in question to Hirjibhái Hormasji Setná, his heirs, executors, administrators, and assigns, for Rs. 20,000, repayable on the 14th of August then next ensuing, with interest at eight per cent. per annum, payable monthly, which mortgage contained a power of sale, and other usual clauses, and a proviso that, if monthly payments of interest were regularly made, the mortgagee should not compel payment of the principal before the 14th of February 1862, or take proceedings to obtain possession ; that the "mortgage money" was not paid ; that the lease of the 1st of May 1859 to Henry Rogers expired on the 30th of April 1864, and that on the 28th of April 1864 the mortgagee had given to the plaintiff's notice to quit at the expiration of the lease, and the plaintiff's having refused so to do, the mortgagee, Hirjibhái Hormasji Setná, had, on the 7th of June 1864, brought in the High Court an action against Henry Rogers, to recover possession of the house and premises.

The written statement further alleged that the defendant had no authority from his wife, A'imáye, or the mortgagee, to agree to grant a renewal of the lease ; and that they both repudiated any agreement on the part of the defendant to renew the lease.

The defendant submitted that, "being only a mortgagor, and having only the same interest as A'imáye his wife had in the said house and premises, and having no power or authority to contract for or bind either A'imáye or the mortgagee, he had, at the most, only a parcel or portion of an estate at sufferance ; and as one tenant at sufferance cannot, as against a mortgagee, make another tenant at sufferance," he ought not to be compelled specifically to perform an agreement which, if performed, would be inoperative as against A'imáye and the mortgagee.

The issues settled by Mr. Justice Hore were as follows :—

(1) Whether the alleged contract in the plaint mentioned was

a sufficient agreement to satisfy the Statute of Frauds; (2) Whether the defendant was or is bound to procure the concurrence of the mortgagee or A'imáye, or either of them, in granting, or joining in granting, a renewal of the lease; (3) Whether the allegations contained in the written statement, so far as the same are relevant, or any of them, are true; (4) Whether the defendant, *at or before the institution of this suit*, had any, and if any what, title or interest in the premises, or any and what power to grant a lease thereof, or the means of acquiring such title, interest, or power; (5) Whether the defendant, at the further hearing and final disposal of this suit, hath any, and what, title or interest in the premises, or any, and what, power to grant a lease thereof, or the means of acquiring such title, interest, or power; (6) Whether the mortgagee and defendant's wife, A'imáye, or either of them, had, at or before the institution of this suit, any, and if any what, title or interest in the premises; (7) Whether the mortgagee and defendant's said wife have, or either of them has, at the further hearing and final disposal of this suit, any, and if any what, title or interest in the premises; (8) Whether the plaintiffs have, by their conduct or lâches, disentitled themselves to a specific performance of the contract; (9) Whether, under the circumstances disclosed by the plaint and written statement, or either of them, so far as the same are relevant, the plaintiffs are entitled to the relief prayed, or any part thereof; (10) Whether the 4th, 6th, and 7th issues are, or any one of them is, material.

It was proved on the trial before Mr. Justice Hore that, in April or March 1864, the plaintiffs verbally offered to redeem the mortgage, but the mortgagee declined; and that, throughout the term of five years granted by the lease of 1859, the rent had been paid by the plaintiffs to the defendant, Naoroji.

The mortgagee, in his evidence, denied all knowledge of the agreement for renewal entered into by the defendant. The defendant's wife was not examined.

The conveyance of the 12th of February 1859 and the

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mortgage of 14th February 1859 were produced at the trial, on behalf of the defendant; and the execution of those documents by the parties thereto was admitted on behalf of the plaintiffs. Improvements were said, but not admitted, to have been made by the plaintiffs in the premises, with the knowledge of the defendant, his wife, and the mortgagee. Nothing eventually turned upon that point.

Mr. Justice Hore held—(1) That there was a sufficient contract in writing to satisfy the Statute of Frauds; (2) That the existence of the mortgage, and non-concurrence of the mortgagee, did not disentitle the plaintiffs to a specific performance of the agreement, inasmuch as the defendant must either himself redeem, or allow the plaintiffs to do so; (3) That all immoveable property in the island of Bombay is of the nature of chattels real or personal estate; and that, as the property in question was conveyed to the defendant and his wife, and as marriage, according to the English law, operates as a gift to the husband of all the wife's chattels real, the defendant is entitled to let it, or dispose of it in any way he may think fit, without the concurrence of the wife; (4) That "even supposing that the property is real estate, the defendant would be able to grant it on lease for five years, provided he and his wife should so long live; and as the plaintiffs are willing to accept a lease on these conditions," they were entitled to it. And, accordingly, Mr. Justice Hore decreed that the defendant should specifically perform the agreement. Against that decree the defendant, in April 1865, filed a petition of appeal.

The Appeal was subsequently, during two days, argued before COUCH, J., and WESTROPP, J.

Bayley, and *E. Howard*, for the appellant, contended that the estate whereof the appellant and his wife were seized was real, and not personal, estate; that the appellant was not competent to give a valid lease for five years certain; and that the Court accordingly would not decree him specifically to perform his contract. They waived the point as to the Statute of Frauds. The following authorities were

referred to:—*Freeman v. Fairlie* (a); *Gardiner v. Fell* (b); *Co. Lit.* 291 b; *Keech v. Hall* (c); *Thornbrough v. Baker* (d); *Costigan v. Hastler* (e); *Hutton v. Beeton* (f); Sugden's *Vendors and Purchasers*, 11th ed., p. 237; *Harnet v. Yielding* (g);—Acts IX. of 1837, XXIX. of 1839, XXX. of 1839, and XXXI. of 1854; and *Doe d. De Silveira v. Texeira* (2 Morley Dig. 247).

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Marriott and Green, for the respondents, insisted on a specific performance, whether the estate of the defendant and his wife in the premises were real or personal; and, beside commenting on all, and relying on some of the authorities mentioned by the appellant's counsel, cited *Coote on Mortgages*, 334, 517; *Doe d. Whitaker v. Hales* (h); *Fisher on Mortgages*, p. 123; 1 *Bright's Husband and Wife*, p. 26; *Green d. Crew v. King* (i); and 2 *Cru. Dig.* by *White*, p. 374.

Bayley, in reply, mentioned *the Earl of Oxford's case* (j), and *Peterson v. Hickman*, there referred to by Lord *Ellesmere*; *Pilling v. Armitage* (k); and *Dunn v. Spurrier* (l).

Cur. adv. vult.

The judgment of the Court was now delivered by—

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WESTROPP, J., who (after stating the facts as above) said:—In his judgment the learned Judge has very clearly indicated his opinion upon some of the issues; but neither in that judgment nor in the decree has he set forth formal findings upon all of the issues.

The wife of the appellant, and the mortgagee, being strangers to the contract, the plaintiffs have properly refrained from making them parties to this suit: *Tasker v. Small* (m).

On the argument of this appeal the point as to the Statute of Frauds was abandoned by the appellant's counsel.

(a) 1 *Moore's Ind. App.* 305. (b) *Ibid.* 299.

(c) 1 *Douglas* 21, 22; S. C., 1 *Smith L. C.* 293.

(d) 2 *Wh. & Tu. L. C. Eq.* 768. (e) 2 *Sch. & Lef.* 160.

(f) 9 *Jur. N. S.* 1310. (g) 2 *Sch. & Lef.* 549.

(h) 7 *Bing.* 322. See 2 *B. & Ad.* 473. (i) 2 *Wm. Bl.* 1211.

(j) 2 *Wh. and Tu. L. C. Eq.* 444. (k) 12 *Ves.* 78. (l) 7 *Ves.* 231.

(m) 3 *Myl. & Cr.* 63, 68.

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That disposes of the 1st issue, which must accordingly be found in the affirmative.

The plaintiffs (respondents) being willing to accept a lease for five years from the defendant, with such title as he can give, the 2nd issue seems to us to be immaterial. If the respondents, who, as intended lessees, are purchasers *pro tanto*, and as such, in the absence of any waiver of their right, would have been justified in demanding a good title, had insisted upon it, or if the appellant had been plaintiff, and sought to enforce a specific performance of the agreement, he must either have procured the concurrence of the mortgagee in the lease, or redeemed the mortgage (n). But it is within the competence of the intended lessee to waive his right to that concurrence: *Fisher on Mortgages*, p. 123; *Coota* 334. The lease will be good against the mortgagor himself by estoppel: *MacLaughland v. Wood* (o); and, on the other hand, so long as the mortgagee permit the mortgagor to remain in possession of the rents, the provisions of the lease may be enforced by the mortgagor against the lessee: *Trent v. Hunt* (p); *Wheeler v. Branscombe* (q). Moreover, the lessee may, if he please, redeem the mortgage: *Keech v. Hall* (r), per Lord Mansfield. Many of the remarks which we shall make on the 5th issue bear upon this 2nd issue also. The reasoning, which brings us to the conclusion that the 2nd issue is immaterial, compels us to hold that the 6th and 7th issues are likewise immaterial. Our decisions upon those issues and upon the 4th issue, which I shall presently mention, render it necessary that we should find the 10th issue in the negative.

With respect to the 3rd issue, we have no reason for saying that the allegations in the written statement, so far as they purport to be allegations of matters of fact, are untrue; but, even assuming those allegations to be true, we do

(n) Sugd. Vend., 11th ed., 253, 488, *et seq.* (o) 1 Roll. 874, pl. 10.
(p) 9 Exch. 14; 17 Jur. 899. (q) 5 Q. B. 373.

(r) 1 Douglas 21, 22; S. C., 1 Smith, L. C. 293, 294, *acc.* *Fisher on Mortgages*, p. 123; 5 Jarman Conv. by Sweet, 377, 378; 1 Seton on Decrees, 3rd ed., 464; 2 Story's Eq. Jur., pl. 1023, p. 260, 22nd ed.

not think that the facts alleged constitute any defence to this suit. The 3rd issue was, therefore, immaterial. Our reasons, for holding that the facts alleged in the written statement do not form a good defence, will appear when we discuss the 5th issue.

The 4th issue we must also hold to be immaterial. In order to entitle a plaintiff in equity to a decree for the specific performance of a contract, it is not necessary that the defendant should, at the time of making the contract, or at the time of the institution of the suit, be able to perform the contract. If at the final hearing of the suit he be able to perform the contract, the Court will compel him to do so: *Browne v. Warner* (s), per Lord *Eldon*; *Walker v. Barnes* (t); *Clayton v. Duke of Newcastle* (u); *Carne v. Mitchell* (v). However, if the 4th issue had been material, we should not have had any difficulty in finding it in the affirmative. The reasons which would have led us to that conclusion, are those which I am about to give, for the opinion at which we have arrived on the next issue.

Upon the 5th issue, we think that, at the hearing of the suit before Mr. Justice *Hore*, the defendant had such a title to and interest in, the premises in the plaint mentioned, and such a power, or the means of acquiring such a title, interest, or power, as would have enabled him to grant a lease of those premises to the plaintiff. As to his position with regard to the mortgagee we have already expressed our views. For the purpose of determining the 5th issue, we think it was quite unnecessary to consider whether the property in question was real estate or chattel real, that is to say, of a personal nature.

Until the recent legislation of the year 1865 (w), the law uniformly applied to Pársis and their property in the island of Bombay by the Supreme Court, and, since it was closed, by the High Court at its Original Jurisdiction side, has

(s) 14 Ves. 412.

(t) 3 Maddock R. 247.

(u) 2 Cases in Chan. 112.

(v) 15 L. J., Ch. 287.

(w) Act XV. of 1865, Act XXI. of 1865, and the Indian Succession Act of 1865.

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been, as correctly stated in the clear and able Report of the Pársi Law Commission (*x*), (of which Sir Joseph Arnould and Mr. Justice Newton were members), the English Law, except so far as it is varied by Act IX. of 1837, and also, since the decision of the Privy Council in 1856 in *Ardasir Cursetjee v. Perozebaee* (*y*), except as to matrimonial suits at the Ecclesiastical side of the court, and, perhaps I should add, except as to bigamy.

Whether, then, we have regard to the plaintiffs, or to the defendant and his wife, the law applicable to this case was English law. Under that law the premises in question must have been either chattel real or real estate. Whether the estate conferred by the indenture of the 12th of February 1859 upon the defendant and his wife, was chattel real or real estate in its nature, they were seised by entireties, and not as joint tenants *per my* and *per tout*, but *per tout* only : 2 Cru. Dig. by White, 373, Title XVIII., ch. 1, ss. 45, 46; Co. Lit. 187 a. If chattel real, his assignment or lease would bind her surviving : 2 Preston Abst. 39, 43; 1 Bright H. and W. 26; Furlong L. and T. 94. But, if real estate, his lease or conveyance would not bind her surviving : 5 T. R. 652; 2 Wm. Bl. 1211; 2 Ver. 120. However he, being seised, either in his own right, or *jure uxoris*, of the whole estate *during the coverture*, might bind that interest by lease or conveyance: Watkins Conv. 170, 8th ed. The defendant's demise, therefore, would be good for five years if the coverture so long endure.

The result would be substantially the same if the husband and wife be regarded as joint tenants, and seised *per my* and *per tout*, or the husband as simply entitled *jure uxoris*.

For, assuming that the estate or interest of the wife be chattel real, the husband, by his marital right, may dispose of it either wholly by assignment (*z*), or in part, as by demise or underlease: Co. Lit. 351 a; Com. Dig. Title Baron & Feme, E 2; Bac. Ab. Title Baron & Feme, C. 2;

(*x*) Dated 13th October 1862; see also Report of a Select Committee of the Council of the Governor General dated 10th August 1861.

(*y*) 6 Moo. Ind. App. 348.

(*z*) Co. Lit. 46 b., 351 a, and *Ibid.*, part 2 of note 1.

Syms' case (a), Co. Lit. 46 b; 1 Rolle's Ab. 344, pl. 10; *Grute v. Locroft* (b). In *Druce v. Dennison* (c) Lord *Eldon* intimated an opinion that even an agreement by the husband for an underlease of the wife's term would be good against the wife, and so it seems to have been decided in *Steed v. Cragh* (d.)

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Admitting, however, the hypothesis that the estate or interest of the wife is of the nature of realty, and not chattel real, we find it stated in Bacon's Abridgment, with reference to leases not falling within the Stat. 32 Hen. VIII., c. 28, ss. 1, 3, but made under the Common Law, that "It is clearly agreed that if a husband seised of lands in right of his wife, make a lease thereof by indenture or deed poll, reserving rent, this is a good lease for the whole term, unless the wife, by some act after her husband's death, show her dissent thereto; for if she accept rent which becomes due after his death, the lease is thereby become absolute and unavoidable" (e). That position, however, has not been without assailants. It has been said that the lease of the husband alone is, *against the wife and those claiming under her*, not merely voidable, but absolutely void. I refer to the note of Serjeant Williams upon the case of *Wotton v. Hele* (f), *Miller v. Mainwaring* (g), and to Mr. Roper's remarks (h). By some text-writers (i) the point has been treated as doubtful. But it is admitted on all hands that if the lease be made by the husband and wife jointly (though not within the statute), it is voidable only: *Greenwood v. Tyber* (j); *Doe v. Weller* (k); 2 Wms. Saunders 180, note 9; *Smallman v. Agborow* (l); and Mr. Jarman observes, with much force, "It should seem upon principle that the non-

(a) Cro. Eliz. 33.

(b) Cro. Eliz. 287, and see Pop. 4, 145; Moo. Rep., p. 95, pl. 514; 1 Brod & B. 443, 445.

(c) 6 Ves. 385, 394.

(d) 9 Mod. 43, 2 Eq. Cas., 37, pl. 3.

(e) Bac. Ab., Title Leases, C. 1.; *Ibid.* Tit. Bar. & Feme, I.

(f) 2 Wms. Saund. 180, note 9, and 180 a.

(g) W. Jones 354.

(h) 1 Roper Husb. & Wife by Jacob, 94.

(i) Woodfall, L. & T., 6th ed., 20; Chambers, L. & T., 70. But

Comyn (L. & T. 41) regards the lease of the husband as voidable only.

(j) Cro. Jae. 563.

(k) 7 T. R. 478.

(l) Cro. Jac. 417.

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concurrence of the wife would not vary the rule, since she is incapable of binding herself by contract, and leases by her alone are absolutely void" (m). Mr. Furlong also, in his excellent work on Landlord and Tenant, for the same reason, treats a lease by the husband alone as voidable, not void (n). Mr. Furlong and Mr. Jarman both justly attach great weight to the authority of Chief Baron *Gilbert*, the author (o) of the passage already quoted from Bacon's Abridgment, to the effect that a lease by the husband alone is good for the whole term, unless the wife show her dissent thereto by some act after his death. His view is fully supported by *Jordan v. Wikes* (p), also by Mr. Jacob in his edition of Roper's Husband and Wife, and, as already mentioned, by Mr. Jarman, who concludes his remarks upon it by saying (q) "that little doubt exists that the Courts would now hold the lease for years of a husband, seised *jure mariti*, to be voidable only, and not void." Were it now necessary to decide the point, which it is not, we should not have any hesitation in adopting the same view.

However that may be, a husband takes a freehold interest, during the joint lives of himself and his wife, in land belonging to her in fee; and such interest passes by the deed of the husband alone; *Robertson v. Morris* (r). And even Serjeant Williams, in his note already mentioned, admits that a lease by the husband alone "is undoubtedly a good lease during the coverture" (s). Therefore, whether a lease for years by the husband alone, of the real estate of the wife, would, as against her surviving, be voidable only or void, yet he would have a title, though not a perfect title, to make such a lease.

The infirmity in the defendant's title the plaintiffs are will-

(m) 4 Byth and Jarm. Conveyancing, by Sweet, p. 242.
 (n) page 29.

(o) In Mr. Gwillim's preface to the 5th edition of Bacon's Abridgment it is stated that the materials of that compilation as far as the title "Simony" were collected from Chief Baron *Gilbert's* writings.

(p) Cro. Jac. 332. See also Vaughan R. 46, 2 Taunton 180, and Cro. Jac. 617.

(q) p. 243. (r) 11 Q. B. 916. (s) 2 Wms. Saund. 180 b.

ing to excuse, and it is not competent for him, a vendor, to except to his own title : *Bradley v. Munton* (*t*).

There was not any argument seriously addressed to us on behalf of the defendant in support of the affirmative of the 8th issue, nor have we been able to discover any evidence which favours it. That issue must, accordingly, be found in the negative.

The remaining issue is the 9th. The conclusions at which we have arrived upon the other issues have already indicated our opinion that it must be found in the affirmative.

The appellant, we think, had such a title as would enable him to make a lease for five years, good as against himself, and, if not void, at least, upon his decease, voidable as against his wife and those claiming under her, if her estate in the premises be real, and absolutely good as against her and those claiming under her, if her estate be of the nature of chattel real.

The respondents being willing to accept a lease for five years with such a title as the appellant can confer, we think that the decree of the learned Judge, that the appellant should specifically perform his contract, was right, and must be affirmed with costs.

The learned Judge, however, not only decided that the property, the subject of this suit, was chattel real ; but did so on the broad ground that all immoveable property in Bombay was of the nature of chattel real, and that there was not any immoveable property of the nature of freehold or inheritance in this island.

He rested that opinion upon certain general principles which he laid down, and also upon the judgment (given on the 31st of March 1817) of Sir Alexander Anstruther (who was Recorder of Bombay from the 10th of March 1814 to the time of his death, on the 16th of July 1819) in *Doe d. De Silveira v. Teixeira* (*u*), of which Mr. Justice Hore says : "The law pronounced in that judgment is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least."

(*t*) 15 Beav. 460.

(*u*) 2 Morley's Dig. 247.

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The reasons which we have already given for affirming the decree of the learned Judge in favour of the plaintiffs, sufficiently show that, in our opinion, it was unnecessary and extrajudicial on his part to decide whether the property in this case was chattel real, and still less necessary to decide whether all immoveable property in Bombay was of that nature.

Were we to remain silent as to the doctrine of the learned Judge, that all immoveable property in Bombay was, when he gave his judgment, of the nature of chattel real, and as to his statement that "the law pronounced" in the judgment of Sir A. Anstruther "is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least," it might be supposed by the legal profession and the public that this Court concurs in those views. Such a misapprehension might produce much embarrassment in conveyancing and in the deduction of title, and other injurious results. We should not, we conceive, show proper respect to the learned Judge were we simply to express our dissent, without, at some length, giving our reasons. Hence we find ourselves compelled to speak (and we do so with reluctance) extrajudicially on this subject.

It is unnecessary to touch upon the legislation of 1865 (the Indian Succession Act [X.] of 1865, and Act XXI. of 1865), or to consider what effect (if any) it may have in altering the nature of property for any purpose save that of transmission on the death of the owner, inasmuch as this suit was instituted, and the judgment of the court below was given, before that legislation took place or came into force; and the part of the learned Judge's judgment now under consideration, related to the devolution and nature of immoveable property (amongst persons other than Hindus and Muhammadans) previously to and down to the year 1864, and to the nature of that property under the law as it then existed.

What that devolution and nature were, must still for some time to come, notwithstanding the recent legislation of which we have spoken, be questions of importance.

In adverting to Sir A. Anstruther's judgment in *Doc d. De Silveira v. Texeira*, we shall refrain from expressing any opinion upon the ground on which he actually decided that case. He admitted that, on the cession of Bombay to the Crown of England, the Portuguese laws were not reserved to the Portuguese inhabitants. He said, "Upon referring to the treaty by which the island of Bombay was given to King Charles the Second in 1661, I find that the religion of the Portuguese inhabitants, and their *privileges* and *rights*, are secured to them as subjects of the King of England, but the continuance of the Portuguese law is not stipulated; and this is the more strong, as the Portuguese laws were by the same treaty reserved to the Portuguese colonists at Tangier" (y). But he presumed that a subsequent local law or regulation had been made by the East India Company (under the power to legislate given to them by the Charter 20 Charles II., 27th March 1668, which made over Bombay to the Company), reserving to the Portuguese their law or custom of succession, and on that presumption made his decree (z). The validity of that presumption is a question which has presented itself, and probably must be considered in another suit (*Lopez v. Lopez*), now pending before myself in the Second Division Court. The rest of his judgment was extra-judicial, and therefore fairly open to present criticism.

That the English Law has, to a certain extent, been introduced into India, has been arrived at by two different lines of reasoning.

The earlier of those was that adopted by judicial authorities, and attributes the introduction of English Law into British India to charters granted by the Crown, and certain statutes under which some of those charters were granted, or whereby they were modified.

The other is that adopted by the Indian Law Commissioners in their celebrated *Lex Loci* Report of the 31st October 1840.

A third school (the Mofussil courts) would appear never to have acknowledged any general *lex loci* in British India; and,

(y) 2 Morley's Dig. 250, 251. (z) *Ibid.*, 251, 252, 265.

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in the absence of any positive law, to have generally, though not invariably, held itself bound to follow the law of the domicile of origin of the parties, but with this peculiarity, that it has applied English law to all British subjects technically so called.

If it be denied upon general principles, as it has been by Sir Alexander Anstruther and Mr. Justice Hore, that any immoveable property in that part of British India called Bombay could have been of the nature of freehold of inheritance, it becomes important to consider the various grounds on which the Commissioners, the Queen's courts, or the Company's courts have arrived at the conclusion that the English law has, to any extent, been introduced into British India, and to ascertain whether, and to what extent, that portion of the English law which relates to real property has been applied, not only within any other presidency town besides Bombay, but also in the Mofussil at large. We think it the most convenient course to notice in the first instance the views of the Commissioners.

The question (a) discussed by them was "what is the law to which all persons in British India for whom no special provision has been made, or who are not excepted on account of special circumstances, are subject; or, in other words, what is the *lex loci* of British India."

The *lex loci* in Bombay previously to the cession of the island to Charles II. could only have been the Hindú law, the Muhammadan law, or the Portuguese law.

The argument of the Commissioners, as to what was the *lex loci* of British India when they made their Report, chiefly affects the Hindú and Muhammadan law. The argument of the Judges, founded on charters and statutes, would affect not only those two systems of law, but also the Portuguese law.

The argument of the Commissioners may be thus epitomised:—

Recognising the rule prevailing amongst civilised nations

(a) It arose upon certain petitions presented to Government by East Indians and Armenians.

that, upon the cession or conquest of a country, its laws remain in force until altered by the acquirer or conqueror, and bind all persons in the country, the Commissioners held that such a doctrine must receive some limitation when the law of the country is in its nature wholly inapplicable to strangers. Adverting to the exception from that doctrine mentioned by Lord Coke in *Calvin's* case (b), that by conquest of an infidel kingdom its laws are *ipso facto* abrogated, "for that they be not only against Christianity, but against the law of God and of Nature contained in the decalogue;" and also adverting to the extrajudicial *dictum* of Lord Mansfield in *Campbell v. Hall* (c), in which he designated that exception as "absurd," and suggested that it "in all probability arose from the mad enthusiasm of the crusades;" and further referring to his doctrine that "the law and legislative government of every dominion equally affect all persons and all property within the limits thereof, and are the rule of decision for all questions which arise there;" the Commissioners admit it to be absurd to suppose that the Hindú and Muhammadan laws were abrogated *ipso facto*, when the King of Great Britain brought those countries under his subjection. They adopt Lord Mansfield's doctrine, so far as to hold that the Hindú and Muhammadan laws did not cease upon the conquest to bind Hindús and Muhammadans, but reject so much of it as would compel them to say that these laws continued after that event to bind all Christians and others as long as they abode in this country, and give it as their opinion "that the Christian subjects of the British Crown and of other nations coming into British India, indeed all persons in British India not being Hindus or Mahomedans, are, independently of all Statutes, Charters, and Treaties, exempt from the operation of the Hindu and Mahomedan Laws," &c., and say that the Hindú and Muhammadan laws "are so interwoven with religion (d) as to be unsuited for persons professing a different faith."

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(b) 7 Rep. 17. (c) Cowper R. 204, 209.

(d) See Master Stephen's report in *Freeman v. Fairlie*, 1 Moo. Ind. App. 324.

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The Commissioners, at some length, then proceed to show that the unfitness either of the Hindú law or of the Muhammadan law to be the *lex loci* of a country subject to a government neither Hindú nor Muhammadan, is the consequence of the indissoluble union of law with religion, but with this remarkable difference between the two cases, that the Hindús, in consideration of this intimate union, hold that, even in a country governed by their own princes, their own law, being the word of God addressed specially to the Hindú race, is not the law of the place, but the law of the Hindú inhabitants; whereas the Muhammadans draw a quite different inference from the identity of their law and religion, and hold that their law, being the word of God addressed generally to all mankind, is not only the *lex loci* of countries subject to Muhammadan sovereigns, but ought to be the law of the whole world. In accordance with this principle, they, departing from the international doctrine of Europe, hold that upon the acquisition of any country by a Muhammadan prince, their law becomes the *lex loci*, not at the discretion of the prince, but as a matter of strict law and religion; and also that their law, when it has been once introduced, can never be lawfully superseded by any other system. After noticing in detail the provisions of the Muhammadan law with respect to persons not Muhammadans by creed, as laid down by the more strict and as laid down by the more enlightened Musalmán lawyers, the Commissioners say: "Whether, then, we consider the Mahomedan law as itself repudiating the international doctrine of Christian Europe, or the ignominious position which it assigns to persons of a different faith, where the legal rights of Mussulmans are concerned, or lastly the practice sanctioned by its most liberal expounders, of having each class of subjects who are not Mussulmans to administer their own laws among themselves by judges of their own, we must conclude that the doctrine of the unfitness of the Mahomedan law to be the *lex loci* of a country which has passed under the government of a Christian prince, rests upon a more solid foundation than the mad enthusiasm of the crusades."

Having shown that neither the Hindú nor Muhammadan law

is the *lex loci* of any part of British India, the Commissioners proceed to contend that the English law is the *lex loci*, asserting that, if it be not, they are driven to conclude that there is none at all; and remark that "a country governed by one of the civilised nations of modern Europe, and yet having no *lex loci*, would be a phenomenon without example in jurisprudence." If there had been no authority for the proposition that English law owes its introduction into India to the charters of the Supreme Courts or the Mayors' Courts, the Commissioners say that they would have had "little hesitation in denying it, and in asserting that when any part of British India became a possession of the British Crown, there being in it no *lex loci*, but only two systems of rules for the government of two religious communities, the English law became *ipso jure* the *lex loci*, and binding upon all persons who do not belong to either of those communities." Then they proceed thus: "There is certainly no express authority (e) for this doctrine; but if it be admitted that neither the Hindu nor Mahomedan Law can be considered as *lex loci*, then British India must, we think, be considered, with regard to all persons not Hindus or Mahomedans, as an uninhabited country colonised by British subjects. And then, according to what is said to be laid down by the Lords of the Privy Council, 2 Peere Williams 75, with the reasonable limitations assigned to it by Sir Wm. Blackstone, 1, 107, those British subjects must be held to have carried with them to this country so much of English Law as is applicable to their situation, and so much of the English Law must be held to be, and to have been ever since the country became subject to the British Crown, the *lex loci* of British India."

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The Commissioners add, that, as British subjects were not originally subject to the jurisdiction of the Mofussil courts, and as the Indo-British race had not sprung up when those courts were first established, it was not then of much immediate importance to determine what was the *lex loci*, or whether there was any; but that the time had arrived when it

(e) i.e., no express judicial authority.

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was incumbent on Government to consider and decide those questions. The Charter Act (*f*) had thrown open India to British subjects. Act XI. of 1836 had made them amenable in civil cases to the Mofussil courts. Act IV. of 1837 had enabled them to hold land, and the Privy Council had declared that aliens were competent to do so. Trade had increased the influx of European and American foreigners, and the East Indian population had become numerous, and was yearly increasing. The want of a *lex loci* would soon become as mischievous in practice as it was anomalous in theory. They recommended the passing of an Act declaring that so much of the law of England as is applicable to the situation of the people, and not inconsistent with the Regulations or Acts of the Government of India, should be taken to be the law of the land throughout British India, except the places subject to the jurisdiction of Her Majesty's courts. They proposed to exempt from that law Hindús and Muhammadans, and to exclude from it British statutes passed since 13 Geo. I., unless specially introduced into India by Acts of the Government of India. The words "so much as is applicable to the situation of the people," they thought ought to be sufficient to exclude English tenures and conveyancing, "but, lest this should not be so, recommend an express exclusion of them." They recommended, but admitted that it required "direct legislative sanction," that the interest of any person in real property, situate without the limits of the local jurisdiction of Her Majesty's courts, shall go to the executor or administrator of such person, and be distributed according to the Statute of Distributions.

Mr. Amos, the President of the Commission, in a separate minute, stated that he agreed that it was desirable that a *lex loci*, founded on the English law, should be established, but was "not prepared to give a confident assent to the conclusion" of his colleagues, that English law had been introduced simultaneously with the acquisition of our territories in India. He thought the terms "conveyancing and tenure," as employed by them, were vague, and that "there

(*f*) Stat. 3 and 4 Wm. IV., c. 82, ss. 81 to 86.

is so much of the English laws of tenure and conveyancing, especially if a large interpretation be given to these terms, which is essential to the complete and secure enjoyment of property by a highly civilized people ;" that he was not disposed to recommend the dispensing with them generally, though particular exceptions may be proper, and the free use of the most simple kind of conveyances be indispensable. He doubted as to the propriety of allowing succession to real property according to the Statute of Distributions, and was not then " prepared to recommend this departure from the law of England," and said, " Moreover, it is to be considered that the proposed rule will have the effect of establishing a different law of succession *from that which obtains in the Presidency Towns and in England.*"

The recommendation made by the Commissioners as to passing a *declaratory* Act has never been carried into effect. The Indian and Pársi Succession Acts of 1865, although, from the 1st of January 1866, excluding throughout India the English law of succession to real property, are not declaratory Acts.

The Commissioners admitted that there is grave authority which is not reconcileable with their view, and that all of the Judges of the Supreme Court of Calcutta who have declared any opinion upon the subject have referred the introduction of the English law into India to royal charters. This doctrine the Commissioners, for various reasons, contend to be unreasonable, and conjecture that it was first broached after the establishment of the Supreme Court in 1774. They say that " it has rather the air of having been devised as a means of reconciling the language of the Charter, implying, as that language does, that the Courts were to administer English law, with the doctrine laid down by Lord Mansfield in *Campbell v. Hall* (decided in the very same year), according to which all Englishmen in India would, if there had been no legislative interference, have been subject to Hindu or Mahomedan law."

In support of their view as to the introduction of English law into British India, the Commissioners quote the opinion

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of Master Stephen, expressed in his very learned and able Report, made in the year 1823, in *Freeman v. Fairlie* (g) (which case we shall again mention). Referring to the two general rules : 1st, that if a new country is discovered or settled by British subjects, they carry with them the English law, so far as that law is applicable to their local circumstances ; and 2^{ndly}, that, on the other hand, in colonies or settlements acquired by cession or conquest, the laws of the place remain in force until changed by royal or parliamentary authority ; he (h) treated the case of our Indian territories as anomalous, and that there not being in those territories, when we acquired them, any established *lex loci*, it became a matter of necessity that the British should adopt a new course, namely, to regard the case, in a great measure, as that of a newly discovered country—to use the English law, so far as it was capable of being applied, for the government of the Company's servants, and other British or Christian settlers, and to leave the Muhammadan and Gentú inhabitants to their own laws and customs. He was of opinion that the charter did not introduce the English law, but implied that it had been already introduced.

Lord Stowell, in his eloquent judgment in *The Indian Chief* (i), in determining the temporary national character of an American merchant resident at Calcutta to be derived not from what, for the sake of argument, he assumes to be the paramount sovereignty of the Mogul, but from the British Factory, says : " It is a rule of the law of nations applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the Western parts of the World, in which men take their present national character from the general character of the country in which they are resident ; and this distinction arises from the nature and habit of the countries. In the Western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest

(g) *Ibid.*, 323, 324, 325. (h) *Moo. Ind. App.* 305.

(i) 3 *Robinson's Adm. Rep.* 22, 29.

times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation ; they continue strangers and sojourners as all their fathers were : *Doris amara suam non intermisceat undam.*" (j)

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As to the opinion at which the Commissioners arrived, that English law was introduced into our various territories in India simultaneously with the acquisition of them, *Colvile, C. J.*, in *Musleah v. Musleah* (k), says : "This conclusion of the Commissioners, in the absence of that declaratory Act which they recommended, can only be treated as matter of opinion or speculation. It is inconsistent with the 9th section of Reg. VII. of 1832" (to which I shall presently refer), "nor could we, in the absence of that enactment" (the declaratory Act recommended by the Commissioners), "act upon it, so as to declare that the contrary practice of the Courts of the East India Company is, having regard to their peculiar constitution, erroneous. There is certainly more legal authority for the conclusion that this Court, when the parties are neither Hindus nor Mahomedans, is both empowered and bound to administer English law to all persons and over all persons within its jurisdiction. And the theory, which ascribes this modified introduction of English law into the Mofussil to the Charters and Letters Patent, in my opinion, derives additional weight from the 17th section of the 21 Geo. III., c. 70, which empowers the Court to hear and determine all suits against the inhabitants of Calcutta ; and it is on the ground of the inhabitancy, actual or constructive, of the parties, that the Court generally acquires jurisdiction over immoveable property held by others than British subjects in the Mofussil, in the same manner as is prescribed for that purpose in the said Charter and Letters Patent. Nevertheless it is impossible to deny that there is some force in the Commissioners' objection to that theory ; and Lord Brougham's masterly judgment in *The Mayor of Lyons v. The East India Company* (l), which in one passage

(j) Virg. Ecloga X. 5. (k) Boulnois Rep., p. 241.

(l) 1 Moore's Ind. App. 175.

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treats the introduction of British Law into the Mofussil as a question far less clear than its introduction into Calcutta, and in another assumes that what may be true of lands held by British subjects, is not necessarily true of lands held by persons who do not fall within that category, makes it difficult to treat the question (*m*) now under consideration as concluded by authority."

Assuming for the moment that the Commissioners were right in their opinion as to the original introduction of English law, yet if they regarded that law as continuing to be the *lex loci*, subsequently to the year 1832, of so much of the Mofussil as is subject to the Bengal Regulations, such a view is (as we have already stated was remarked in *Musleah v. Musleah* by *Colvile*, C. J.) opposed to Bengal Reg. VII. of 1832, Sec. 9, which provides that whenever "in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Hindu or Mahomedan persuasion, the laws of those persuasions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they should have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles."

No such *express* prohibition of "the introduction of the English or any foreign law" is to be found in the Bombay or Madras Code of Regulations for the Mofussil.

The provision in the Bombay Code is Reg. IV. of 1827, Sec. 26: "The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government ap-

(*m*) That question was how the lands, situated in the Mofussil, of a Jew who died domiciled in Calcutta, should, by the Supreme Court at Calcutta, be held to descend.

plicable to the case ; in the absence of such Acts and Regulations, the usage of the country in which the suit arose ; if none such appears, the law of the Defendant ; and, in the absence of specific law and usage, equity and good conscience alone ;" and see Sec. 27, cl. 1 and 2.

The Madras Reg. II. of 1802, Sec. 17, adopted the old Bengal Reg. III. of 1793, which (Sec. 21) directed the Judges, in cases where no specific rule existed, to act according to justice, equity, and good conscience (n).

Having mentioned the foregoing Regulations, it is convenient here to advert to the third school. The Commissioners show that under those Regulations the Mofussil courts of India are in nearly the same position in regard to law as Courts of Equity in England. And they must and do, in order to decide rightly, adopt the maxim on which English Courts of Equity act, viz., that equity follows the law. The Commissioners stated that the principle which the Mofussil courts have adopted is that there is no lex loci in British India, and their practice has been to ascertain, in the best manner they could, what was the law of the country (it would perhaps be more correct to say, of the class) of the parties before them, with this limitation, however, that all British subjects (technically so called) were to have English law administered to them. So that a Scotsman would have English law administered to him, which, however, for cogent reasons assigned by the Commissioners, they considered to be no practical grievance. To some of the decisions of the Mofussil courts we shall presently advert.

To show the groundwork of the opinion of the school first mentioned, which attributes the introduction of the English law into India to royal charters and letters patent, it is needful to refer briefly to some of those documents (o).

The charter of the 43rd Eliz. (31st December 1601) created the Governor and Company of the Merchants of London

(n) See *Abraham v. Abraham*, 9 Moo. Ind. App. 195, and *Varden Seth Sam v. Luckpathy Royjee Lalla*, *Ibid.* 303.

(o) As to the introduction of the Law of England by charters, see *Vaughan* 293.

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trading into the East Indies (which I shall, for brevity, call the London Company), a body corporate capable in law "to have, purchase, receive, possess, enjoy, and retain lands, rents, privileges, liberties, jurisdictions, franchises, and *hereditaments* of whatsoever kind, nature, or quality soever they be, to them and their successors, and also to give, grant, demise, alien, assign, and dispose of lands, tenements, and *hereditaments*." It empowered the Governor and Company to make and enforce laws "for the good government of the same Company, and of all factors, masters, mariners, and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of the said trade and traffic," provided that such laws "be reasonable, and not contrary or repugnant to the laws, statutes, or customs of this our Realm." This power to legislate, it should be observed, contains no express reference to factories or territories.

The letters patent 7 Jac. I. (31st May 1609) confirm, in nearly identical language, the preceding charter (43 Eliz.) in the above particulars.

In the second index to a volume of charters, from A. D. 1601 to A. D. 1774, relating to India and published in 1774, it is mentioned that there was a charter, 20 Jac. I. (dated 4th February 1622), empowering the London Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour, either with martial law or otherwise" (p). I have not been able to procure any copy of that charter.

The letters patent 13 Car. II. (3rd April 1661) confirm the charter 43 Eliz. and the charter 7 Jac. I. (1609) in the above-quoted particulars, and, further, contain this very important provision: "That the Governor and his Council of the several and respective places where the said Company have or shall have any factories or places of trade within the said East Indies, may have power to judge all persons belonging to the said Governor and Company, or that shall live under

(p) See Anderson's English in Western India, 129; 1 Bruce's Annals 522; 3 *Ibid.* 551.

them, in all causes, whether civil or criminal, according to the laws of this Kingdom, and to execute judgment accordingly. And in case any crime or misdemeanour shall be committed in any of the said Company's factories in the said East Indies where judicature cannot be executed as aforesaid, for want of a Governor and Council, there, then, and in such case it shall and may be lawful for the chief factor of that place and his Council, to transmit the party, together with the offence, to such other plantation, factory, or fort, where there is a Governor and Council, where justice may be executed, or into this Kingdom of England, as shall be thought most convenient, there to receive such punishment as the justice of the offence shall deserve."

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Master Stephen does not, nor does Lord *Lyndhurst* in *Freeman v. Fairlie* (q), specially mention the charter or letters patent of the 13 Car. II. (3rd April 1661), which, it will be perceived, is the first charter that actually created courts of justice in British India, directing, as it did, that the Governor and Council, not only of the factories and places of trade which the London Company then possessed, but also of those which they should subsequently acquire, should be courts of justice in all causes, civil and criminal; and that the laws to be administered in those courts, as well to the persons belonging to the Company, as to "the persons who shall live under them," should be "the laws of this Kingdom," i.e., England. That charter has been noticed by Sir Charles Grey, C.J., in his judgment in *Jebb v. Lefevre* (r), and by Lord Kingsdown in *The Advocate General of Bengal v. Ranees Surnomoye Dossee* (s). The Indian Law Commissioners appear to have overlooked both it and the case of *Jebb v. Lefevre*, which was decided fourteen years before the date of their *Lex Loci* Report. We shall presently revert to the charter 13 Car. II. (3rd April 1661.)

Upon the marriage of Charles II. to Princess Catharine of Portugal in the same year (1661), the city and castle of

(q) 1 Moo. Ind. App. 321.

(r) Clarke's Addl. Cases, 56, 58, S.C.; Morton's Rep., Montrou's ed., p. 152.

(s) 9 Moo. Ind. App. 426.

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Tangier, with all its rights, profits, territories, and appurtenances, its income and revenue, and the full and absolute dominion and sovereignty of that city and castle, and the aforesaid territories with all their royalties, &c., were by the 2nd article of a treaty (*t*) dated the 23rd of June 1661, and consisting of twenty articles or clauses, ceded by Alfonsus VI., King of Portugal, to the British Crown. Then follows this proviso : " That all the military and other inhabitants of the aforesaid town and castle of Tangier, or so many as choose to remain and reside there, shall be treated on the most friendly footing ; the free exercise of the Roman Catholic religion shall be permitted to them, and in all civil matters they shall obey the King of Great Britain, and, as subject to and under the dominion of the said King, *they shall be ruled and governed by the same laws and customs as have hitherto been used and approved in the aforesaid town and castle.*" By the eleventh article of the same treaty the King of Portugal gave, transferred, granted, and confirmed to the Crown of Great Britain " the port and island of Bombay, in the East Indies, with all the rights, profits, territories, and appurtenances whatsoever thereunto belonging, and, together with the income and revenue, the direct full and absolute dominion and sovereignty of the said Port, Island, and Premises, with all their royalties, freely, fully, entirely, and absolutely," &c. &c. " The inhabitants (as subjects of the King of Great Britain, and under his sovereignty, crown, jurisdiction, and government) being permitted to remain there, and to enjoy the free exercise of the Roman Catholic religion in the same manner as they do at present, it being always understood, as it is now declared once for all, that the same regulations shall be observed for the exercise and preservation of the Roman Catholic religion in Tangier, and all other places which shall be ceded and delivered by the King of Portugal into the possession of the King of Great Britain, as were stipulated and agreed to on the surrender of Dunkirk into the hands of the English ; and, when the King of Great Britain shall

(*t*) See a copy of this treaty in the Records of Government, Vol. II., Public Department, A.D. 1773.

send his fleet to take possession of the said Port and Island of Bombay, the English shall have instructions to treat the subjects of the King of Portugal throughout the East Indies in the most friendly manner, to help and assist them, and to protect them in their trade and navigation there."

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The distinction (noticed by Sir A. Anstruther) between the stipulations contained in this treaty as to Tangier and those as to Bombay is very remarkable. Though the free exercise of the Roman Catholic religion for the inhabitants of both those places is stipulated for, the retention of the existing laws and customs of Tangier alone is provided for. The absence of any such reservation in favour of the laws and customs of the inhabitants at large, or Portuguese inhabitants in particular of Bombay, cannot have been unintentional. We have not to look very far for the reason for this distinction between Tangier and Bombay. Two months and twenty days before the date of this treaty of cession the laws of England were, as we have seen, introduced by the charter of 13 Car. II. (3rd April 1661) as the guide in all cases, civil and criminal, in the factories or places in India which the London Company then had, or thereafter might have. It is not too much to suppose that the advisers of King Charles II. thought that it would be too glaring an inconsistency that the laws of England should prevail in the factories and settlements of the Company in India, and that the Portuguese or some other laws not English should prevail in the territory of the Crown in the same country. When we look at the names of the plenipotentiaries, Lord Chancellor Clarendon [Hyde], the Earl of Southampton, the Earl of Albemarle [Monk], the Duke of Ormond, the Earl of Manchester, and Sir Edward Nicholas and Sir William Morico (Secretaries of State), who entered into that treaty on behalf of Charles II., we cannot be surprised at finding that such an inconsistency was avoided. No such reason existed against the preservation of the laws and customs of the inhabitants of Tangier.

That treaty reserved, as has been seen, to the inhabitants of the island of Bombay, permission to remain there, and

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to enjoy the free exercise of the Roman Catholic religion ; but, although I have often carefully perused the twenty articles of which the treaty consists, I have been unable to discover in it any such general reservation of their "privileges and rights," as Sir A. Anstruther mentions. He could scarcely have intended to refer to the twelfth article of that treaty, which was as follows :—" In order that the subjects of the King of Great Britain may enjoy more ample benefits from their trade and commerce throughout the King of Portugal's dominions, it is covenanted that the merchants and factors, over and above the grants made to them by former treaties, shall, in virtue of this treaty, have the liberty of residing in all places where they shall judge proper, and particularly that they shall dwell and enjoy the same *privileges* and *immunities*, so far as they relate to trade, as the Portuguese themselves, in the cities and towns of Goa, Cochin, and Diu, provided, however, that the subjects of the King of Great Britain resident in any of the aforesaid places shall not exceed the number of four families in any one of them." The *privileges* and *immunities*, here spoken of, are manifestly *privileges* and *immunities* of residence and trade, to be enjoyed not in Bombay, but in places still continuing under the government of Portugal. It is not improbable that, by an error of memory, Sir A. Anstruther attributed to the marriage treaty of 1661 the clause as to *privileges* contained in the charter of 1668, of which we shall presently speak.

The Earl of Marlborough was deputed to take over possession of Bombay, its territories and appurtenances, on behalf of Charles II. Disputes arose between him and the Portuguese as to whether the islands of Salsette and Caranja formed part of the territories and appurtenances of Bombay. After some fruitless endeavours to arrange the extent of cession, the Earl returned to England, leaving Sir Abraham Shipman, who with five hundred troops had accompanied him to India. Sir Abraham landed his men at the island of Anjeediva, not far from Goa. He and the greater part of the troops having died on the island from want of provisions and accommodation, and the unhealthiness of the cli-

mate, (u) his secretary, Mr. Humphrey Cooke, "to preserve his own life and the lives of the remaining troops" (v), acceded to a treaty with the Viceroy of Goa, Don Antonio de Mello e Castro, for the cession of Bombay, substantially renouncing all claim to the neighbouring islands, granting to the Portuguese of those islands the free use of the fisheries and of the harbour of Bombay, without payment of tribute or custom duty, and free ingress and egress for the fleets of the King of Portugal; that owners of estates in the island of Bombay, whether resident there or not, should be free to farm those estates, or to sell them, on the best terms procurable, and should the English require them they should give for them their fair and just value;—that all deserters, runaway slaves, "Gentoos" in charge of property belonging to Portuguese or other subjects of the King of Portugal, *Curumbees* (Kunbís), Bhandáris, and artificers who might escape from Portuguese territory, and place themselves under the protection of the British flag, should be immediately sent back to the Portuguese territory. It also contained provisions for the free exercise of their religion by the inhabitants of the island, and *inter alia* the following clause: "Persons possessing revenue at Bombay derived either from patrimonial or crown lands, shall continue to possess them [sic] with the same right, and shall not be deprived thereof, except in cases which the laws of Portugal direct, and their sons and descendants shall succeed to them with the same right and claim above mentioned, and those who may sell the said patrimonial or crown estates shall transfer to the purchasers the same right and perpetuity they had, that the purchasers may enjoy the same, and their successors in the like manner." It was also provided that the inhabitants and landholders of Bombay should not be obliged to pay to the Crown of England a higher foras than they used to pay to the Crown of Portugal. A copy of that treaty will

(u) Fryer says: "In the meanwhile Sir Abraham Shipman, with near 300 of his best men, rested content without any further acquests, leaving their bones at Angediva, poisoned partly by the noisomeness of the air, the violence of the rains, and the little defence against them, but chiefly by their own intemperance."

(v) 2 Bruce's Annals 155.

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be found at pages 1987 to 1994, and a summary of it at pages 1994 to 1996, of Vol. 95 of the Diary of the Revenue Department at the Bombay Secretariat for 1814, being Nos. 1 and 2 of the papers which form the Appendix to Mr. F. Warden's Report, or Essay, on the Landed Tenures of Bombay, which Report has been *in part* published in the Proceedings of the Bombay Geographical Society for June to August 1839.

Some only of the documents annexed to it, or abridgments thereof, including the treaty entered into by Humphrey (Inofre) Cooke, have been published in the same number of the Bombay Geographical Society's Proceedings, at page 68 to page 71.

The so-called treaty of Humphrey Cooke with De Mello e Castro was never ratified, either by the Crown of England or that of Portugal, and was expressly repudiated by the former (w).

In a letter (x) from Charles II., dated the 10th of March 1676-7, to Lewis de Mendoça Furtado, Count of Lavradio, Viceroy and Captain General of Indian Affairs and Dominions for the Regent of Portugal, Cooke's treaty is thus spoken of: "That very unjust capitulation which Humphrey Cooke was forced to submit to at the time when that place (Bombay) was first transferred to our possession, which capitulation neither he, Humphrey, was empowered to come unto, nor any one else to impose upon him in contravention to a compact" (the treaty of the 23rd of June 1661) "framed in so solemn and religious a manner. We therefore are determined to protest against the said capitulation, as prejudicial to our Royal dignity and derogatory to our right, which we hold in the higher estimation for coming to us, in part of her dowry, with our aforesaid dearest Consort." The

(w) 2 Bruce's Annals 168; Warden's Report on the Landed Tenures of Bombay, paras. 10, 187, 188, 189 (pp. 4, 43, 44 of the printed edition); Anderson's English in Western India, 113, 353; 1 Mill Hist. Ind. 67, 5th ed.; and see per Perry, C. J., in *Wardens of Nossa Senhora v. Bishop Hartmann*, Perry's Oriental Cases, p. 335.

(x) Copy in Records of Government Vol. 27, Public Department, for 1773-4, p. 146.

same letter also speaks of the displeasure with which Charles II. had learned "that our subjects going by sea on the prosecution of their trade unto the dominions of the Great Mogul and Savagee (Siváji), between whom and us a good understanding subsists," were charged with a tribute for sailing "through the open Straits of Tannah, as also for passing by Caranjah, though lying contiguous on the very waters of our said Port" (Bombay), and that he (Charles II.) had forbidden the East India Company to submit to that tribute.

A subsequent effort, made in 1699-1700, by the Portuguese, to induce the Government of Bombay to form a treaty recognising the treaty of Humphrey Cooke, completely failed (y).

By Royal Charter (20 Car. II.) dated the 27th of March 1668, *reciting the Charter of the 13 Car. II.* (3rd April 1661), and reciting also the treaty of the 23rd of June 1661, Charles II. did "give, grant, transfer, and confirm" to the London Company the Port and Island of Bombay, "with all the rights, profits, territories, and appurtenances thereof whatsoever, and all and singular royalties, revenues, rents, customs, castles, forts, buildings, and fortifications, privileges, franchises, preëminences, and *hereditaments* whatsoever," &c., in as large a manner as the Crown of England enjoyed or ought to enjoy them, under the grant of the King of Portugal in the treaty of 1661, "and not further or otherwise," and created the London Company "the true and absolute Lords and Proprietors of the Port and Island and premises aforesaid, and of every part and parcel thereof," which appertained to the Crown of England by force of the grant of the King of Portugal, "and not further or otherwise" (saving the allegiance due to the Crown of England, and its royal power and sovereignty over its subjects in and over the inhabitants of the port and island), "to have, hold, &c. the said Port and Island, &c. "unto them," the said Company, "to the only use of them," the said Company, "their

(y) Anderson 353, citing a letter from Sir J. Gayer and his Council to the Court of Directors, dated 1st February 1700.

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successors and assigns for evermore, to be holden of Us, our heirs and successors, as of the Manor of East Greenwich in the County of Kent, in free and Common Socage, and not in Capite, nor by Knight's Service," at the rent of ten pounds yearly payable to the Crown (z).

This charter reserved, as the treaty of 1661 had done, to "the inhabitants of the said Island" "the free exercise of the Roman Catholic religion," "and further also that the said inhabitants, and other our subjects in the said Port and Island, shall and may peaceably and quietly have, hold, possess, and enjoy all their several and respective properties, privileges, and advantages whatsoever which they lawfully had or enjoyed, or ought to have had or enjoyed, at the time of the surrender of the said Port and Island to us as aforesaid, or at any time since, anything in these presents contained to the contrary notwithstanding." We think that this proviso cannot be regarded as conferring upon the inhabitants of the island any other or higher rights than they were entitled to under the marriage treaty of Charles II.

The charter also provided that the Company or their assigns should not at any time "sell, alien, transfer, or otherwise dispose of the said Island and premises, or any part or parts thereof, to any Prince, Potentate, or State, or other person or persons whatsoever, but such as are or shall be the subjects and of the allegiance" of the Crown of England. Had the question as to the introduction of so much of the English law of real property as prevents aliens from holding freehold land arisen in Bombay, which arose in *The Mayor of Lyons v. The East India Company*, with respect to lands in Calcutta and the Bengal Mofussil, this proviso would have been important (a). In saying so, however, we are not to be understood as intimating any opinion that the result of such a question arising in the present day at Bombay might not be the same as it was in Calcutta and the Mofussil. We have not met with such a proviso in any of the other charters relating to India.

(z) See Perry's Oriental Cases 62.

(a) See the remarks of Lord Brougham in *The Mayor of Lyons v. The E. I. Company*, 1 Moore's Ind. App. 275.

This charter further contained a power for the Company “to ordain, make, establish, and under their common seal to publish, any laws, ordinances, and constitutions whatever, for the good government and other use of the said fort and island of Bombay and the inhabitants thereof,” and also “to impose pains, punishments, and penalties, by fines,” &c. &c. “for the observation of the same laws,” &c., “so always as the said laws, &c., pains, &c., be consonant to reason, and not repugnant or contrary, but as near as may be agreeable, to the laws of this our Realm of England.”

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It further provided that it should be lawful for the Company, “by themselves or by their Governor or Governors, officers, and ministers, &c., according to the nature and limits of their respective offices and places within the said port and island of Bombay, the territories and precincts thereof, to correct, punish, govern, and rule all and every the subjects of Us, our heirs and successors, that now do or at any time hereafter shall inhabit within the said port and island, &c. according to such laws,” &c. as by the said Company, “in any general Court or Court of Committees as aforesaid, shall be established, and to do all and every other thing and things which unto the complete establishment of justice do belong, by Courts, Sessions, forms of judicature, and manner of proceedings therein, *like unto those established and used in this our realm of England*, although in these presents express mention be not made thereof, and by Judges and other officers” by the Company, or by the “Chief Governor or Governors of the said port and island of Bombay, to be delegated to award process, hold pleas, judge and determine *all actions, suits, and causes whatsoever, of any kind or nature whatsoever, and to execute all and every such judgment, so always as the said laws, ordinances, and proceedings be reasonable, and not repugnant or contrary, but as near as may be agreeable, to the laws, statutes, government, and policy of this our Kingdom of England, and subject to the provisos and savings herein.*” (b). It also

(b) See Perry's Or Ca. 63, n., referring to a passage in Clark's Colonial Law p. 7, n. 9, which is as follows: “But when by royal commission a new legal constitution has been granted to a colony establishing a legis-

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for military purposes, or in case of rebellion, mutiny, or sedition, purported to sanction the use of military law (c). It further declares that "all and every the persons being our subjects which do or shall inhabit within the said Port and Island of Bombay, and every of their children and posterity, &c., within the precincts and limits thereof, shall have and enjoy all liberties, franchises, immunities, capacities, and liabilities of free denizens and natural subjects within any of our dominions, to all intents and purposes as if they had been abiding and born within this our Kingdom of England, or in any other of our dominions."

The next proviso is also important. It declares that it shall be lawful for the Company, their agents, factors, and servants, "to have, hold, *exercise*, enjoy, and *execute* all and singular the *jurisdictions*, powers, liberties, privileges, benefits, and advantages whatsoever within the said Port and Island of Bombay," &c., as they or any of them "may or can hold, use, *exercise*, enjoy, and *execute*, by force and virtue" of the Charter 13 Car. II. (3rd April 1661), "in any other place or places of the said East Indies, or touching any other their plantations, &c., and servants or, &c. &c., comprised or mentioned, or intended to be comprised, within our said charter or letters patent, in as large and ample manner, to all intents, constructions, and purposes, as if the said *jurisdictions*, powers, liberties, &c. &c., were herein particularly mentioned and expressed."

The reason given by Lord *Kingsdown*, in *The Advocate General v. Ranee Surnomoye Dossee* (d), for not holding that the Charter 13 Car. II. (3rd April 1661) conferred jurisdiction (by the authority given to the Governors and their Councils to judge all persons belonging to the said Company, or that

lature, courts of justice, &c., the commission has generally directed that the law administered in its courts of justice, shall be in all things as nearly agreeable as possible to the law of England. After the issuing of such commission, therefore, the law of England is the rule in cases not specially provided for." And see *ibid.*, pp. 25, 26.

(c) For an instance of capital punishment by martial law at Bombay, A.D. 1674, see 2 Bruce 367, 368, and Anderson 219.

(d) 9 Moore's Ind. App. 426.

should live under them) over native subjects of the Mogul does not seem applicable to Bombay. It was not a factory, such as the Company had at Surat or on the Hooghly, or in many other parts of India. It was not held by the Company from the Mogul or any other Native power. The full sovereignty of the island had been acquired by Charles II. from the King of Portugal, and Charles II. had full power by those letters patent of 1668 granting the Island to the London Company, expressly purporting to provide for legislation and administration of justice in accordance with the law of England, and by reference incorporating in those letters patent all jurisdictions &c. mentioned in the charter of the 3rd of April 1661, to introduce English Law for the government of all persons resident in Bombay. It may perhaps be considered that, on the principle *expressio unius exclusio alterius*, the marriage treaty of 1661, by expressly reserving their laws to the inhabitants of Tangier, and by silence as to the laws of the inhabitants of Bombay, implied that the English Law should prevail in Bombay.

Subsequently to the cession of the island by the Portuguese to the Crown, disputes arose between the Government and the inhabitants, as to what lands belonged to the latter, and what had belonged to the Crown of Portugal. Those disputes continued after the island was made over to the Company (e). Under date the 12th of November 1672, certain articles of agreement (f), (known as Governor Aungier's Convention), were entered into between Governor Aungier and his Council, on behalf of the Company of the one part, and "the people of this Island" of the other part. That convention recites that since the surrender of Bombay to the Crown of Great Britain, "some occasions of great discontent did succeed, through the want of a good under-

(e) 2 Bruce's Annals 191, 255; Warden, paras. 21, 28, 57, pp. 7, 8, 10, and 17 of the printed edition.

(f) See copy at p. 1996 of the Diary for the Revenue Department for 1814. This convention has not been printed in the Proceedings of the Geographical Society with Mr. Warden's Report, although forming No. 3 of the Appendix to the original Report. That Report and all its Appendices were copied into the Diary above mentioned.

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standing of what did belong of right to the Crown, and what did belong to the people, which gave the original cause of seizing of lands and estates of several people, to the general disquiet of His Majesty's subjects." The grant of Bombay by the Crown to the Company was also recited, and that orders were issued by the Governor in Council, "in obedience to His Majesty's and the Hon'ble Company's commands, for restoring the said lands to the persons who were aggrieved, provided that, upon examination of their titles, they could show just right thereunto;" but that it so happened that, in the examination of such titles, many doubts arose, which gave cause of disquiet to the present possessors of houses and lands, and that the people, "in a public declaration and manifesto," proposed to the Governor in Council the payment of "a yearly contribution or composition, of 20,000 xeraphins (*g*) per annum to the Honourable Company, *including the present quit-rent or foras (h)*, provided that the present possessors of their respective lands and estates may be confirmed and established in their possessions, and thereby be secured from all doubts and scruples that may arise thereafter, and that the lands formerly seized may be restored to the pretenders thereunto; that, at the desire of the Governor in Council, "a general assembly of the chief representatives of the people" was held on the 1st of October 1672, at the Castle of Bombay; and on the 4th

(*g*) Thirteen xeraphins *tempore* Charles II. equalled £ 1-2-6 sterling. The xeraphin contained five tangoes or three larees. Fryer, Letter IV., chap. VII., p. 205.

(*h*) "Foras" is derived from the Portuguese word "*fora*," (Latin *foras*, from *foris* a door), signifying *outside*. It here indicates the rent or revenue derived from outlying lands. The whole island of Bombay fell under that denomination when under Portuguese rule, being then a mere outlying dependency of Bassein. Subsequently the term *foras* was, for the most part, though perhaps not quite exclusively, limited to the new salt batty ground reclaimed from the sea, or other waste ground lying outside the Fort, Native Town, and other the more ancient settled and cultivated grounds in the island, or to the quit-rent arising from that new salt batty ground and outlying ground. The quit-rent in Governor Aungier's convention called *foras* also bore the still older name of *pensio* (*pensao*, pension), and since that convention has been chiefly known by the name of *pension*. It was payable in respect of the ancient settled and cultivated ground only. *Vide infra*, note (*p*), page 45.

of the same month, they presented to the Governor in Council a paper containing twelve proposed articles of agreement, which were publicly read at "another general assembly, whereunto all the people in general interested in this affair were invited to appear," which was held on the 1st of November 1672, and this convention or "composition between the Hon'ble East India Company and Inhabitants of this Isle of Bombay and Mayim, subjects of the said Company, and others, that having *lands of inheritance* on this isle are living in other places," was agreed to. There were present at this meeting Governor Aungier and his five Members of Council, all bearing English names, and amongst them Mr. James Adams, "Attorney General for the Hon'ble Company;" also the English Secretary to the Council, the Portuguese Secretary, and a Portuguese named DeLima, Assistant to the Attorney General. The chief representatives of the people were also present, namely, "Father Reginald Burgos, Procurator for the Reverend Fathers of the Society of Jesus, Mr. Henry Gray,* Signor Alvaro Perez de Tavora, Lord of the Manor of Mazon," and five other persons bearing Portuguese names, one of whom is described as a procurator. It is unnecessary to state the twelve proposed articles at full length: suffice it to say that they comprised the offer of a payment, by the inhabitants, of 20,000 xeraphins yearly, including therein the quit-rents theretofore paid, and, in substance, stipulated that the Company should waive all claims to the estates in the possession of the inhabitants, and should confirm them, "notwithstanding any suspicion that the present possessors may have fallen into," and should deliver up to "the old possessors, of what condition soever," the estates which had already been seized; that the lands should not be measured, "that the people may not be at so great a charge, considering their extreme poverty;" that if any exemption should be granted by the Company to any individual of his share of the 20,000 xeraphins, the amount of that share should be deducted out of the 20,000 xeraphins, "and this in respect this

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* Henry *Gray* may probably be a clerical error for Henry *Gary*, mentioned *infra*, p. 47.

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composition is made upon all estates and *lands of inheritance* of the interested in the Isle." Similar deductions were demanded in the event of any of the oarts, batty-grounds, of other lands subject to the annual charge, devolving upon the Company, or being taken for the purpose of building the city or fortifications, or if any of the palmyras were cut down for those purposes. None of the proposed articles contained any reference whatever, either direct or indirect, to the course of descent of or succession to immoveable or any other property belonging to the inhabitants. The articles ultimately agreed to and accepted on both sides were fourteen in number. The 1st was "That in consideration of the 20,000 xeraphins to be paid annually, at three payments, into the Hon'ble Company's Treasury," the Governor in Council, on behalf of the Company, promised "to put a final end to all claims, pretences, and lawsuits whatsoever, which have arisen or may arise between the Hon'ble Company and the people touching the titles, lands, or estates of palmyras, cocoanut trees, or batty grounds, throughout the whole isle, excepting what is by joint agreement excepted." The 2nd, "That to the present possessors be granted new patents, confirmed according to the respective titles by which their heirs and successors shall enjoy their estates." The 3rd in substance declared that deductions should be made from the 20,000 xeraphins to the extent of any exemption granted by Government to any individual contributor, and also if any lands subject to the tribute should be taken for public purposes, "and this in respect the said contribution is made upon all the estates and *lands of inheritance* of the whole isle." The 4th, "That all estates of batty grounds and cocoanut trees seized by the former government, and now in possession of the Hon'ble Company, shall be restored to their respective owners, and they, *their heirs* and successors, confirmed in their said possession as above is expressed." The 5th article provided that if any of the said lands &c. should devolve upon the Company by any title whatsoever, or if any trees were cut down, or "oarts of batty ground made use of for the building of cities, towns, or fortifications, then the value of the said lands or trees shall be

omputed, and a proportionable abatement" made out of the annual contribution. The 6th article contained the assent of the Governor in Council to the manuring of the palmyras and batty grounds with fish, provided the Company sanction the same (*i*). The 7th provides for an abatement in the annual contribution in the event of injury to the lands or estates, by storm or other calamity. The 8th provides for the collection of the annual tribute by persons to be nominated by the contributors, and two persons to be nominated by Government. The 9th article is as follows: "That all royalties, rights, privileges, immunities, which did formerly belong to the Crown of Portugal of (*j*) foras and royal rents, of what nature or condition soever, they shall be saved, as of right they belong to the Hon'ble Company. The 10th article reserves to the Company "the little isle Colio (*k*), reaching from the outer point westwardly of the Isle to the paccary (*l*) called Polo" (*l*), which, it is stated, "will be of great use to the Hon'ble Company in the good design which they have for the security and defence of the whole Isle." A "reasonable satisfaction" is promised to "the persons interested therein." The 11th article provides for the time at which the tax or tribute should commence, and that the first payment thereof should "be left in the hands of the people by the Governor in Council, towards purchasing and buying out those persons who have estates and lands in the Colio." The contributors were, however, to pay the quit-

(*i*) The Company is recited to have previously objected to such a practice. And see Fryer, Letter II., chapter I., p. 68, and Despatch from the Council of Surat to the Deputy Governor and Council of Bombay dated 4th June 1672: Outward Letter Book, Vol. I., p. 267.

(*j*) *Sic* in copy; *quære* whether "of" is not a mistake for "and."

(*k*) "Colio" is probably derived from the Coli or Koli fishermen, who had a village or hamlet on the isle, which would appear to be that now known as Colaba or Koolaba—Arabic for a strip of land running out into the sea.

(*l*) Pákhadí, Maráthi for a paved path, or an alley (literally a wing) of a village.

(*m*) Polo, a corruption of Pálwa, derived from Pál (पाल), which, *inter alia*, means a large fighting vessel, by which kind of craft the locality was probably frequented. From Pálwa or Pálwar the bandar now called Apollo is supposed to take its name. In the memorial of a grant of land, dated 5th December 1743, by Government to Essa Matra, in exchange for land taken from him as site for part of the fort walls, the pákhadí in question is called "Pallo."

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rent as usual. The 12th article provided for the survey of the whole isle, and measurement of the lands and estates of each person at a moderate charge. The 13th, " That there shall be reserved for the Hon'ble Company's Service all grounds on the water side within the compass of the Isle, to be disposed of in necessary occasions for the public, excepting such ground wherein there are at present planted gardens of cocoanut trees, or rice grounds, as also churches, houses, or warehouses of stone ; and whensoever for the public good it shall be necessary to make use of any of the said places or properties, the Governor and Council shall make satisfactions to the interested in a reasonable manner. But the people are to take notice that they receive in this particular favour from the Hon'ble Company, their Governor and Council, in regard that in all Kingdoms of the World, the ground on the water side from the distance of forty yards at least from high-water mark belongs, as a sovereign right and privilege, to the Kings or Princes thereof." The 14th article declared that the Governor and Council established and ratified this agreement as perpetual and irrevocable between the Company and the people, and contained a promise by the Governor in Council to prevail with the Company " to establish and confirm the same by a patent made under their hands and seals."

That Convention was signed by the Governor, the Deputy Governor (Captain John Shaxton), the five Members of Council (including Attorney General Adams), and the English Secretary to the Council, and purported to be sealed with the Company's seal. It was also signed by "one hundred and twenty of the eminent *Povo* (*n*), on behalf of the whole *Povo* of the Isle."

The Governor and Council having " been given to understand that several inhabitants of the Isle did give out divers words tending to the dishonour and discredit of the Hon'ble Company's Government on this Isle, saying that the abovesaid contract made between the Governor or

(*n*) *Poro*, people.

Hon'ble Company and the Povo was unjust" (o), reconvened all the Povo in a general assembly on the 16th of July 1674, and desired them " to declare their minds freely, without the least apprehension of fear, concerning their sense of the said contract, and whether they owned those exclamations against it ; declaring further that they were at their own liberty whether it should be disannulled and made void, or be confirmed. Whereupon the Povo in general said they never exclaimed against the said contract, but were thoroughly satisfied therewith, and of the justice thereof, it being an affair of their own request and seeking after, and desired that the Governor in Council would be pleased to ratify and confirm the said contract unto them, which was unanimously on both sides agreed on, and signed and confirmed by both parties in Bombay Castle, the 16th July 1674, 26 Caroli Secundi Regis Angliae &c." (p)

(o) In a subsequent despatch to the Court of Directors, dated 17th January 1675-6, Governor Aungier and his Council wrote : " When the contribution of 20,000 xeraphins per annum raised on the lands was established, certain English, very few in number, who possessed lands, refused to pay what was assessed on them, pretending they did not sign the contract, which we thought not prudent to take much notice of during the war. But, since, we have demanded what they owe thereon ; which they have much complained of, and we presume will present your Honours with a petition, whereunto we have only to say that a few might be gratified if the consequences were not evil. Private property is generally too eagerly pressed, without regard to public inconvenience. It may so fall out that a great part, if not the whole, of the lands on the island, may fall into the hands of the English, who might pretend the same privilege, and therefore we thought it not safe to begin an evil example. But we submit to your better judgment, it were well if the English were encouraged to plant on the island, which would be made secure, if all the land were possessed by them. But some better way may be found to privilege them above others, which we recommend to your Honours' better judgment."

(p) Mr. Warden, at para. 33 of his Report on the Landed Tenures of Bombay, (p. 11, printed edition,) says of Governor Aungier's Convention :—" At this early period, therefore, were the inhabitants secured in their possessions ; all who now hold property subject to the payment of what is called pension (pensão), possess it by a tenure of which the Government cannot deprive them unless the land is required for building ' cities, towns, or fortifications,' when reasonable satisfaction is to be made to the proprietors." Mr. LeMessurier, Advocate General, in his Report printed in No. III. of Bombay Government Records, New Series, para. 56, p. 16, says of the same Convention that it referred " to lands which are known under the designation of Fazendary lands, paying pension and tax, and not to foras or salt hatty lands, which it may be said were not at that time in existence, having been recovered from the sea some years afterwards." *Vide suprà*, note (h), p. 40. As to the probable extent of the lands on which the Convention operated, see Warden.

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Whether there was any formal ratification, by the Court of Directors, of Governor Aungier's Convention, does not appear. In the answer of the Company to the memorial of the Portuguese Envoy, relative to the military services of the Portuguese inhabitants of the island of Bombay, dated 18th March 1691-92, it appears to have been referred to as a valid and subsisting arrangement (o). There is not any doubt that it has been acted upon by the Government of Bombay and the inhabitants.

The annual payment of 20,000 xeraphins, which was the foras or quit-rent fixed by this Convention, continues to the present day under the name of pension (pensão), a name of great antiquity, and which in Latin, pensio, designated the yearly payment made by tenants in emphyteusis, a species of tenure which it will be necessary that we should again mention.

The island of St. Helena was, by Charter 25 Car. II. (16th Dec. 1674), granted by the Crown to the Company; to hold in free and common socage as of the manor of East Greenwich, and not *in capite* or by knight's service.

The Charter 28 Car. II. (5th Oct. 1677) recites and confirms the charters 13 Car. II. (1661) and 20 Car. II. (1669), which have been already mentioned.

The Charter 35 Car. II. (9th August 1683) recited the confirmation, by the Charter 13 Car. II., of the charters of Elizabeth and James I., and the monopoly of trading thereby granted to the London Company; and that the London Company had complained of many "disorders and inconveniences which have happened and been committed" by British subjects and foreigners, and that many other difficulties might arise necessary to be redressed; and established a Court of Judicature to be held at such places, forts, plantations, or factories upon the coast, as the Company should from time to time direct, and to consist of "one per-

para. 60 (p. 18, printed ed.), and as to the addition of tax to pension, *ibid.*, paras. 71 to 74 (pp. 23, 24, printed ed.).

(q) 3 Bruce's Annals 104, 105; Warden's Report, paras 32, 53 (pp. 10, 16, printed ed.).

son learned in the civil law, and two merchants," to be appointed by the Company, with power to determine what may be briefly described as all mercantile and maritime cases, and trespasses, injuries, and wrongs committed upon the high seas, or in the trading limits of the Company in Asia, Africa, and America, "according to the rules of equity and good conscience, and according to the laws and customs of merchants."

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In his recent able and learned argument in *Lopez v. Lopez*, I recollect that Mr. Edward Howard quoted, from 2 Bruce's Annals, p. 242, the recommendation of the Commissioners who took over Bombay for the Company from the Crown, in 1668, that, "as disputes must arise from the habits of the people, accustomed to civil Law, a Judge Advocate might be appointed to take cognizance and decide in such cases;" and he suggested that the fact of the appointment of a Doctor of Civil Law (Dr. John St. John) to be a Judge at Bombay, in 1683-84, was a compliance with the recommendation of the Commissioners, and indicated that the Civil Law, rather than the Common Law, then prevailed in Bombay. The phrase "civil law," however, coupled as it is with civil cases, was probably used by the Commissioners in contrast to military or martial law, and not as meaning the Roman law. That the Directors so understood it, would seem probable from their comment in 1670-71, which I shall presently mention, on the proposal that a professional Judge should be appointed. Mr. Edward Howard also sought to draw a like inference from the earlier appointment of Captain Henry Gary in 1677-78 (who had been previously Deputy Governor) to be Judge of the island of Bombay (r). Of him the late Rev. Philip Anderson, in his accurate and interesting work "The English in Western India," says, "Hamilton calls him an old Greek, but he had been born in Venice, of English parents. He was more merchant than soldier, and had gained some learning, being well acquainted with Latin, Greek, and Portuguese" (s). In a subsequent part of his

(r) 2 Bruce's Annals 407, 417.

(s) p. 116; and see Fryer, Letter IV., ch. II., p. 157, and Letter II., ch. I., p. 64.

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book, Anderson gives a remarkable instance of the mode in which Mr. Gary occasionally discharged his judicial duties (*t*). Mr. Edward Howard argued that whether Mr. Gary was Greek or Venetian, he was more likely to know the Civil than the English law, and probably for that reason, as well as his knowledge of Portuguese, was appointed Judge of the island of Bombay. But the Court of Directors in 1670-71, while approving of the plan of civil administration (of which, so far as it was judicial, I shall presently speak) of Governor Aungier, explained "that care should be taken that trial by jury should be introduced into the Courts of Justice, agreeably to English Law, but declined engaging a Judge versed in civil law, being apprehensive that such a person might be disposed to promote litigation, and probably might not obey the orders which the President and Council might find it for the interest of the Company to give him; it had, therefore, been resolved to send some persons who had received education in law, as civil servants, without making the practice of the Law their only object, and if they deserved well, they might be appealed to, as assistants in the Courts of Justice :" 2 Bruce's Annals, 279 (*u*). It was after this, in 1677, that Mr. Gary was appointed a Judge. In 1669-70 Governor Aungier had formed two Courts of Judicature in the island. The inferior court, consisting of a Company's civil servant, assisted by natives, who were to take cognisance of all disputes under the amount of 200 xeraphins, and the superior Court to consist of the Governor (*v*) or the Deputy Governor and Council, to whom appeals were competent from the inferior court,

(*t*) p. 20, referring to Hamilton's New Account, Chap. XVII.

(*u*) And see Anderson 130.

(*v*) By two minutes of Governor Aungier and his Council (31st January and 4th February 1669), it appears that in 1669, he and they, with the assistance of eleven additional councillors (specially appointed for the occasion) "and a jury consisting of half English and half Portugals," tried Mr. Richard Ball for the killing of Diego Rodrigues. The jury properly acquitted him, the evidence being of the weakest character. The constitution of the jury seems to have been in obedience to a prior general order of the East India Company, "that all cases of difference between English and Portugals should be decided by a jury of half English and half Portugals." Instances of juries empanelled in Bombay in 1672 are mentioned in the Surat Outward Letter Book, Vol. I., pp. 261, 267.

to take cognisance of all civil and criminal cases whatever, and their decisions were to be final and without appeal, except in cases of the greatest necessity; these courts were to meet regularly once a week: 2 Bruce's Annals, 271; Anderson 129, 130, 134 (*w*). Doctor Fryer, a Fellow of the Royal Society, whose travels in India commenced in 1673 and finished in 1681, whom Anderson affirms to be "next to official records the best authority we have for the knowledge of men and manners at that time," and whose account of Bombay contains intrinsic evidence of intelligent observation and precision, says: "The Government here now is English; the soldiers have *martial law*, the freemen *common*; the chief arbitrator whereof is the President with his Council at Surat; under him is a justiciary, and Court of Pleas, with a committee for regulating affairs, and presenting all complaints" (*x*). The administration of the Common Law, as described by Fryer, is in complete accordance with the Charters 13 Car. II. (3rd April 1661) and 20 Car. II. (27th March 1668), which made over Bombay to the Company. The constitution of the two civil courts, as described by Bruce, was warranted by those charters when taken in combination. The use of military law (mentioned by Fryer) for military purposes was countenanced by the latter charter.

The Charter 35 Car. II. (9th August 1683) contains, as has been already stated, a recital of the reasons for the creation of the new courts, each of which was to consist of a Doctor of Civil Law and two Merchants. By a despatch dated 7th April 1684, from the Court of Directors to the President and Council at Surat, the Court, in relation to Doctor St. John, says: "We have chosen Dr. John St. John, Doctor of the Civil Law, to be Judge of the Admiralty Court in the East Indies, and of all our maritime affairs there, to be erected in pursuance of His Majesty's additional Charter of the 9th August last, at the salary of £200 a year, and to

(*w*) And see minutes of Council on the 2nd of February 1669, Bombay Government Records.

(*x*) Fryer's Travels, ed. of 1698, Letter II., ch. i., p. 68; and see Letter II., ch. v., pp. 87, 88.

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have the accommodation of his own diet at the Governor's table of Bombay (but all other accommodation for himself and his two servants are to be at his own charge), and to take place at the Governor's table as Second. We therefore order and direct that a convenient place be assigned him for holding the Courts of Admiralty, and that you appoint such Officers as are necessary to attend that Judicature, which is designed for proceeding against all interlopers and private ships and persons trading in the East Indies, or to or from the East Indies, contrary to His Majesty's Royal Charter granted to us." After a direction that the proceedings of the Court should be carried on in English, and not in Latin, and that a table of fees should be published, the despatch continued thus :—

" His Majesty has been pleased, upon our approbation of him, to grant him a Commission under the Great Seal of England (*y*) to the purport aforesaid, and for which also he hath our Commission, under our larger Seal (*z*), a copy whereof we herewith send you. And he is, from time to time, to transmit to you, as also to represent unto the Deputy Governor and Council of Bombay, an impartial account of all his proceedings as Judge of the said Court, *but all other judicatures upon our said Island are to remain in the same condition and order they now are, and under the management of the same persons, until you receive our further orders after we have an account from you of the good deportment of the said Doctor (*a*).*

When Dr. St. John arrived in India, Bombay was in the hands of Captain Keigwin and the garrison, who had revolted against the Company, and declared that they had taken possession of the Island on behalf of the King (*b*). Dr. St. John's commission was, in the first instance, published, and his court erected, at Surat, on the 17th of September

(*y*) Dated 6th February 1683-84. (*z*) Dated 7th April 1684

(*a*) Professor Wilson's note 3 at page 83 of the 1st volume of Mill's History, 5th ed, stating that Dr. St. John had been sent out "to preside in all judicial proceedings at Bombay," requires modification.

(*b*) 2 Bruce's Annals, 512.

1684 (c). By the judicious policy of Sir Thomas Grantham, Captain Keigwin was, on the 19th of November 1684, induced to make a formal surrender of the Island to Sir Thomas Grantham, as bearing the King's commission, and by him it was immediately transferred to Dr. St. John, as the King's Judge, by whom it was delivered over to Mr. Zinzan, as the Company's Governor, until the arrival of the President, Sir John Child, from Surat (d). Shortly afterwards Dr. St. John's Admiralty Court was opened in Bombay. Subsequently he appears to have taken umbrage at having been strictly limited to maritime cases, and at not having been appointed, after his arrival in Bombay, to be the Judge to try *all civil actions* in Bombay. The President, Sir John Child, who had appointed Mr. Vaux to that office, retained that gentleman in it, and, of the conduct of Sir John Child in that respect, Dr. St. John complained in a letter to Sir Leoline Jenkins, Secretary of State. On the other hand, allegations were made that Dr. St. John had taken part with some of the interlopers (e).

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The law which Mr. Vaux professed to administer was the law of England, a course disapproved by Sir Josiah Child, Governor of the London Company, who observed that the English laws were "a heap of nonsense compiled by a few ignorant country gentlemen," and that his orders, not the laws of England, should be the rules by which Mr. Vaux ought to abide (f). Mr. Vaux was also made Deputy Governor, but about two years afterwards was suspended from office, and was in 1697 accidentally drowned in the river Tapti (g). Dr. St. John's career as a Judge in Bombay would appear to have been closed at all events in the year 1690, if not, as seems more probable, at an earlier date (h). It is stated in the 3rd volume of Bruce's Annals, 439, that for the

(c) 2 Bruce's Annals, 538. (d) *Ibid.* 541; Anderson, 226.

(e) 2 Bruce's Annals, 565.

(f) See Perry's Oriental Cases, 573. Anderson 256.

(g) 3 Bruce's Annals, 125; Anderson, 256, 257.

(h) There is some slight evidence in the correspondence of the Bombay and Surat Governments that the office of Admiralty Judge was, subsequently to the retirement of Dr. St. John, held for a short time by Dr. Davenant.

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eleven years immediately preceding the years 1701-2, no court of judicature had been held in the island of Bombay. (See also 3 Bruce's Annals, 127, 568.)

By a commission (*i*) dated 20th January 1685, reciting the Charter 35 Car. II. (9th August 1683), the Company appointed Captain John Nicholson (*j*), Vice-Admiral of the fleet of ships then bound for the Coromandel coast, Judge Advocate of the Court of Admiralty in the Bay of Bengal, both at sea and on shore, during that expedition, and such two out of five factors as might be nominated by the Agent and Council at the Hooghly to be the Judge's assistants (*k*).

The Charter 2 Jac. II., dated 12th April 1686, contained a repetition of the provision in the Charter 35 Car. II. (9th August 1683) establishing courts of judicature, consisting of one person learned in the civil law, and two merchants; and referred to the charters of Eliz. and Jac. I.; and, reciting all of those of Car. II. (especially including those of 1661 and 1669), ratified and confirmed all of "the said Charters and Letters Patent," and gave, granted, constituted, erected, and established unto the London Company "all such, so many, and the like rights, &c., *jurisdictions*, &c., *courts* and authorities, together with such covenants, and subject to such provisions, and in such manner and form to all intents and purposes," as the London Company ever had or enjoyed, &c., "by force or virtue of *all or any* of the before recited Letters Patent."

This confirmation, it should be observed, clearly includes not only the new courts established for mercantile and maritime causes in 1683 by Charles II., and renewed, so to speak, by this charter of James II. in 1686, but also the courts of English law, the establishment of which was sanctioned by Charles II. by the charter of 1661, or authorised by the charter of 1669. The peculiar constitution of the

(*i*) See copy in the Inward Letter Book, 1685.

(*j*) It does not appear how Captain Nicholson was brought within the description of "a person learned in the civil law," as required by the charter of 1683.

(*k*) 2 Bruce's Annals 559.

new mercantile and maritime courts, which were to consist of one person learned in the civil law, and two merchants who were to decide according to the laws and customs of merchants, was used as an argument in *Jebb v. Lefevre* (*l*), in favour of the proposition that lands amongst a commercial community would have been treated as assets for the payment of all debts.

Sir Charles Grey, C.J., dealing with that argument, says: "The Courts established by Charles II. and James II., in which a person learned in Civil Law was to sit, and everything was to be decided by the Law Merchant, may be entirely laid out of consideration, for the Letters Patent from which these Courts derived their authority specify particularly what causes they are to entertain, and it is quite plain that they had no jurisdiction to hold any plea respecting lands or houses, or any interest in them, whether chattel or real."

The charter 5 Wm. and Mary, dated 7th October 1693, confirms the former charters, and in so doing expressly grants and confirms to the London Company all ports, islands, plantations, territories, &c. &c., *manors, lordships, &c.*, houses, lands, tenements, *hereditaments, &c.*, chattels real and personal, debts, &c., *jurisdictions, &c.*, to which the Company were entitled under their former charters; and a subsequent part of this charter directs that "all the manors, lands, tenements, &c., chattels real, chattels personal, and other the premises" thereby granted and confirmed, should be subject to the Company's debts.

Of the Charter 5 Wm. and Mary, dated 11th November 1693, it is unnecessary to say more than that the laws &c. which the London Company is thereby empowered to make, are not to be "contrary or repugnant to the laws, statutes, or customs" of England.

The Charter 10 Wm. III., dated 5th September 1698, established and incorporated the English Company, and empowered it to hold "manors, &c., lands, rents, &c., heredita-

(*l*) Clarke's Addl. Rules and Cases, pp. 62 a, 62 d.

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ments, &c., and to purchase and acquire all goods and chattels whatsoever," and contained provisions as to courts for trying mercantile and maritime causes, precisely similar to those established by the charters of 1683 and 1686 granted to the London Company.

In the Indenture Tripartite of the 22nd of July 1702, between Queen Anne, the London Company, and the English Company, by which those two companies were united under the name of the United Company of Merchants trading to the East Indies (which I shall call the East India Company), Queen Anne sanctioned and agreed to confirm the grant and conveyance by the London Company to the English Company of the port and island of Bombay, and the island of St. Helena, with such "rights, &c., authorities, *hereditaments*, &c." as she might lawfully grant, and were granted by the Charters 20 Car. II. (27th March 1668) and 25 Car. II. (16th December 1674).

By Indenture Quinquepartite of the 22nd of July 1702, the London Company "granted, bargained, sold, assigned, and set over unto the English Company, the Ports and Islands of Bombay and St. Helena, with all the rights, &c., appurtenances, &c., prerogatives, royalties, &c., and *hereditaments* whatsoever" of the London Company in the same islands, or either of them, and also (*inter multa alia*) the factories at Surat, Swally, and Broach, and the factories of Amadavad (Ahmedabad), Agra, and Lucknow, the forts of Carwar, Tellicherry, and Anjengo, and the factory of Calicut.

By Letters Patent 13 Geo. I. (dated 24th September 1726), a corporation, consisting of a Mayor and nine Aldermen (seven of which aldermen were to be natural-born subjects of the Crown, and the other two aldermen might be "subjects of any other Prince or State in amity" with Great Britain), was established at Madraspatnam (Madras), and was constituted a Court of Record by the name of the Mayor's Court, and "authorized to try, hear, and determine all civil suits, actions, and pleas between party and party" that should or might arise, &c., "within the town of Madras-

patnam, or within any of the factories subject or subordinate unto Fort St. George, or to the Governor or President and the Council of Fort St. George." The civil jurisdiction was over any persons, at the time of the institution of the suit, residing or being, or who, at the time the cause of action accrued, resided, within the said Fort or Town, or the precincts, district, or territories thereof. The judgment and sentence was to be according to justice and right; and the execution was to be by seizure and sale of "*the goods and chattels*" of the defendant. In the event of the defendant withdrawing himself from the jurisdiction, and of the sheriff returning *non est inventus* to the summons or warrant, and upon verification (by affidavit or proof) of the plaintiff's demand, the Court might "grant a sequestration to seize the *estate and effects*" of the defendant. In the event of judgment being subsequently given for the plaintiff, the court was empowered "to direct *the effects* so seized to be sold, and out of the produce thereof to make satisfaction to the Plaintiff," and in case such produce should not be sufficient to make satisfaction to the Plaintiff, "to award execution for the residue of the duty and costs recovered in manner aforesaid." Similar Corporations and similar Mayors' Courts, with the same powers and jurisdiction as the Corporation and Mayor's Court of Madras, were by this charter established at Bombay and Fort William. By the same charter the Governor and Council of Fort St. George were constituted a Court of Record in the nature of a Court of Oyer and Terminer, with power to administer criminal justice, in all cases except high treason, "in the same or in the like manner as is used in that part of Great Britain called England," with the assistance of a grand and petty jury. The Governor and Council of Bombay, and the Governor and Council of Fort William, were by this charter constituted into Criminal Courts in Bombay and Fort William respectively, with the same jurisdiction as the Governor and Council of Madras. It also empowered the respective Governors and Councils of Madras, Bombay, and Fort William respectively, with the sanction of the Court of Directors of the East India Company, to make by-laws, rules, and ordinances for the good govern-

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ment and regulation of the several corporations thereby erected, and of the inhabitants of the said several towns, places, and factories, and to impose reasonable pains and penalties upon offenders against them, " provided that all such bye-laws, rules, and ordinances, and all pains and penalties thereby to be imposed, be agreeable to reason, and not contrary to the Laws and Statutes of England." It also authorised the Mayors' Courts to grant probate of wills and letters of administration "as touching the debts and estate" of the deceased. And the administrator was declared entitled to act as such, touching the *debts, effects, and estate* of the deceased. The form of administration bond to be prescribed by the charter was, however, conditioned only for the giving of " a true and perfect inventory of all and singular the *goods, chattels, and credits* of the deceased."

Of that charter, *Peacock, C.J.*, in *The Advocate General of Bengal v. Rance Surnomoye Dossee*, said with reference to Calcutta (m) : " It is a well recognized doctrine, and one which has been acted on by this Court for more than half a century, that, speaking generally, the first introduction of English Law into Calcutta was effected by the Charter of George I., by which, in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position." Of the direction in that charter to give judgment " according to justice and right" in suits and pleas between party and party, he says it " could have no other reasonable meaning than justice and right according to the laws of England so far as they regulated private rights between party and party. Such general words could not possibly refer to any law such as the Mortmain Act or the Alien Laws, which had reference merely to some views of public policy supposed to be applicable to England, even though private rights might be affected by them. Still less could they be supposed to refer to the rights or revenues of the Crown, depending upon prerogative, and which were wholly inapplicable to a territory to which the Sovereignty did not extend."

(m) 9 Moo. Ind. App. 394, and see per Lord *Kingsdown*, *Ibid.*, 426, 427.

The Charter 1 Geo. II., dated 17th November 1727, granted to the East India Company the fines &c. imposed by the Mayor's Court.

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The East India Company, by petition, stated that in September 1746 the French, during their war with England, besieged and took Madraspatnam, and expelled its inhabitants; that the Mayor and most of the Aldermen afterwards died, or returned to Great Britain, or settled in other parts of India, whereby the Company were advised that the Mayor's Court at Madraspatnam was dissolved; and that it had been found by experience that there were some defects in the charter of 1726; and prayed His Majesty to accept a surrender of the charters of 1726 and 1727, and to grant a new charter for creating courts, civil and criminal, at Fort St. George, Bombay, and Fort William, with such alterations &c. as would tend to the better administration of justice. The Crown, accordingly, did accept such a surrender, which was made by the East India Company by indenture of the 6th of January 1753.

In the year 26 Geo. II., on the 8th of January 1753, the Crown granted a fresh charter to the East India Company, erecting, as before, corporations at Madraspatnam, Bombay, and Calcutta (consisting in each of these places of a Mayor and nine Aldermen, of which latter two might be foreign Protestants the subjects of any Prince or State in amity with England), and Courts of Record, called Mayors' Courts, with similar jurisdiction to try, hear, and determine "all civil suits, actions, and pleas arising in Madraspatnam, or in the factories subject to Fort St. George, or to the Government and Council thereof," as in the charter of 1726, but with the following variation:—"except such suits or actions shall be between the Indian Natives of Madraspatnam only; in which case we will that the same be determined among themselves, unless both parties shall by consent submit the same to the determination of the Mayor's Court." Suits were declared to be maintainable against persons residing or being, at the time of the institution of the suit, or at the time of the accruing

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of the cause of action, in either of the three localities in question, "unless the same shall be between the Indian Natives only as aforesaid, or unless such cause of suit shall not exceed five pagodas." Judgment was to be pronounced "according to justice and right." The provisions as to execution or sequestration against ordinary defendants were the same as those in the charter of 1726. The clause as to legislation to some extent differs from that in the charter of 1726, and empowers not only the respective Governors and Councils, but also the Court of Directors, to legislate for the Corporations and Courts and inhabitants. It, however, agrees with the charter of 1726 in providing that the legislation shall not be contrary to the laws and statutes of the realm of England.

This charter constituted Courts of Request to try suits for causes of action not exceeding five pagodas. The provisions constituting the Governors and their Councils respectively Courts of Oyer and Terminer for trying offences (n), and the provisions as to granting of probate and administration by the Mayors' Courts, were the same as those in the charter of 1726.

The Statute 13 Geo. III., c. 63, empowered the Crown to establish a Supreme Court in lieu of the Mayor's Court at Fort William, to consist of a Chief Justice and three other Judges, being barristers of England or Ireland. The number of the Puisne Judges was subsequently, by 37 Geo. III., c. 142, limited to two.

Accordingly by Charter 14 Geo. III., dated 26th March 1774, the Supreme Court was established at Fort William. It was, by clause 13, empowered to try and determine (amongst other suits) actions and suits arising upon or concerning "any rights, titles, claims, or demands of, in, or to any houses, lands, or other things *real* or personal in the several provinces of Bengal, Bahar, or Orissa, or touching the possession or any interest or lien in or upon the same, and

(n) Except that there was a slight diminution of the local extent of the jurisdiction of the Courts of Oyer and Terminer.

all pleas *real*, personal, or mixt," against the East India Company, the corporation of Calcutta, "and against any other of our subjects" resident, or who shall have resided, in Bengal, Bahar, or Orissa, or "who shall have any debts, effects, or estate, *real* or personal, within the same, and against the executors and administrators of such our subjects," and against other persons, to whom it is unnecessary now to make further reference. The judgment was (clause 14) to be "according to justice and right." Execution of judgments might be made by seizure and sale of "the houses, lands, debts, or other effects, *real* or personal," of the party against whom the suits were awarded, or by imprisonment. To compel appearance in suits, "the houses, lands, goods, effects, and debts" of the defendant might be sequestrated, and, in the event of judgment passing against him, might be sold. Criminal justice was to be administered as in England. Power was given to the court to grant probate of wills, and also to grant letters of administration of "the goods, chattels, credits and all other effects" of British subjects dying within the three provinces mentioned. The administrator was to give security "to the value of the estate, credits, and effects of the deceased." The condition of the bond, in the form prescribed by the charter, shows that the administrator "of the goods, chattels, and effects" of the deceased, was to make and exhibit in the court "a true and perfect inventory" of the "goods, credits, and effects." Jurisdictions similar to those of the courts of King's Bench and Admiralty in England were given to that court. Important alterations in and additions to that charter were subsequently made by the Stat. 21 Geo. III., c. 70; Stat. 24 Geo. III., c. 25; Stat. 26 Geo. III., c. 57; and 33 Geo. III., c. 52. The 17th section of the first of these statutes reserved to Gentüs and Muhammadans their respective laws of inheritance, succession, and contract.

The Stat. 37 Geo. III., c. 142, authorised the Crown to establish at Madras and Bombay, in lieu of the Mayors' Courts, courts consisting of the Mayor and three Aldermen and a Recorder, who should be "a Barrister of England or Ireland."

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By Charter 38 Geo. III. (20th February 1798), those Recorders' Courts were established at Madras and Bombay. Jurisdiction similar to that of the Court of King's Bench in England, "as far as circumstances would admit," was given to them; also jurisdiction over all British subjects resident in any of the factories subject to or dependent upon the Governments of Madras and Bombay respectively, and to hear and determine "all suits and actions whatsoever" against any British subjects arising in territories subject to or dependent upon those governments respectively, or within the dominions of any Native power in alliance with those governments respectively, or against any person in the service of the East India Company, or of any British subject, and to try and determine all civil suits or actions rendered triable by Act of Parliament in the Mayors' Courts at Madras and Bombay respectively, and all suits and actions brought against the inhabitants of Madras or Bombay respectively; "yet nevertheless in the cases of Mahomedans or Gentús, their inheritance to lands, rents, and goods, and all matter of contract and dealing between party and party, shall be determined, in the case of Mahomedans by the laws and usage of the Mahomedans, and, where the parties are Gentús, by the laws and usages of the Gentús, or by such laws and usages as the same would have been determined by, if the suit had been brought and the action commenced in a Native Court; and, where one of the parties shall be a Mahomedan or Gentú, by the laws and usages of the defendant." Judgment in all cases was to be "according to justice and right." Execution was to be made by seizure and sale of "the houses, lands, debts, or other effects, *real* and personal," of the party against whom the writ should be awarded, or imprisonment, or both. The provision as to sequestration was similar to that in the charter of the Supreme Court of Fort William of 1774. An equitable jurisdiction, similar to that of the Court of Chancery in England, was given to these Recorders' Courts, and power to appoint guardians of the persons of infants and lunatics and of "their estates." The Recorder' Courts were also made Courts of Oyer and Terminer, to administer criminal justice as in England, "or

as nearly thereto as the condition and circumstances of the places and persons would admit," "attention being had to the religion, manners, and usages of the native inhabitants." Under their Ecclesiastical jurisdiction they were (*inter alia*) authorised to grant probate of wills of British subjects "dying and leaving *personal effects* within the said territories, and of all persons who shall die or have effects" within Madras or Bombay, and letters of administration "of the goods, chattels, credits, and all other effects whatsoever of the persons aforesaid." The proviso as to the giving of security, and the form of the administration bond, were similar to those in the charter of the Supreme Court at Fort William. The court was also empowered to grant letters of administration of the "money and effects," within the limits of its jurisdiction, of persons dying out of those limits. The Admiralty jurisdiction given was similar to that in the Fort William charter.

An illustration of the sense in which the word "effects" is used in this charter of the Recorders' Courts, is furnished by a clause in it directing that when "the monies, securities, and effects of suitors" are ordered to be paid into or deposited in court for safe custody, they are to be paid or made over to the local government, "to be by them kept and deposited with the cash and effects" of the East India Company. There was a similar clause in the charter of the Mayors' Courts of 1753.

The Stat. 4 Geo. IV., c. 71, authorised the Crown to create for Bombay and its dependencies a Supreme Court, with the same powers, and subject to the same restrictions, as those which the Supreme Court for Fort William and its dependencies then had and was subject to. The 17th section enacted that it shall be lawful for the Supreme Court at Madras, within Fort St. George and Madras and the factories &c. &c. dependent upon the Government of Madras, and "that it shall be lawful for the said Supreme Court of Judicature at Bombay, to be created by virtue of this Act, within the said Town and Island of Bombay and the limits thereof, and the factories subordinate thereto, and within the territories

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which now are or hereafter may be subject to or dependent upon the said Government of Bombay : and the said Supreme Courts respectively *are hereby required*, within the same, respectively to do, execute, perform, and fulfil all such acts, authorities, duties, matters, and things whatsoever as the said Supreme Court of Fort William is or may be lawfully authorized, empowered, or directed to do, execute, perform, or fulfil within Fort William, in Bengal, aforesaid, or the places subject to or dependent upon the Government thereof."

Accordingly, by Charter 4 Geo. IV., dated 8th December 1823, the late Supreme Court at Bombay was erected. The provisions of that charter are so familiar to the profession, that I shall merely notice that all the powers of the Mayor's Court under the charter of 1753, and of the Recorder's Court, are conferred upon it; that the provision as to the civil suits between Muhammadans and Gentüs is the same as that in the charter of the Recorder's Court, except that the words "and succession" are introduced after "inheritance" in the charter of the Supreme Court; that execution is to be made by seizure and sale of "the houses, lands, debts, or other effects, *real* and *personal*, of the party against whom the writ should be awarded," or by imprisonment or both; that the provisions as to granting probate and administration, and the form of the administration bond, are the same as those in the charter of the Recorder's Court; and also the provision as to paying into court and depositing "the money, securities, and effects" of suitors, with "the cash and effects" of the East India Company.

Before referring to the authorities, it should be observed that a conflict of opinion arose as to the legality of a practice which would seem, to some extent, to have existed in Calcutta and Bombay, whereby the lands and houses of deceased persons other than Hindüs and Muhammadans were sold by executors and administrators.

In *Doe d. Savage v. Bancharam Tagore* (o) it was held, in 1785, by the Supreme Court of Calcutta, that "the Common

(o) *Morton R. 70*, by *Chambers, C.J., Hyde, J., and Jones (Sir Wm.), J.*

law of England, and the greatest part of the Statute law, having been introduced here (Calcutta) by royal charters, the lands of British subjects must descend as in England, except in so far as the descent is interrupted, or the succession varied by Statute or Charter; and that the necessary consequence of the clauses in the Charter (Supreme Court, 1774) directing that actions, real as well as personal, may be brought not against the heir, but the executor, of a British subject leaving lands, and that houses and lands are to be subjected to execution for debt like chattels, is that land must go to the executor or administrator in the first instance," for the purpose of paying debts, but if not required for that purpose, or so far as it may not be so required, in trust for the heir at law. The administrator *de bonis non* of Whiffin, a British subject deceased, was there, by all of the Judges, held entitled to recover the lands in ejectment from the purchaser, to whom they had been sold by the sheriff under a *fi. fa.*, upon a judgment recorded against the second husband of Whiffin's widow. Whiffin had by his Will, attested by two witnesses only, devised to her a beneficial interest in the lands, which (the widow being dead at the time of the ejectment) was argued to be a life estate only, a point upon which *Chambers*, C.J., and *Hyde*, J., gave no opinion, as they held that the devise was of no effect, being insufficiently attested under the Statute of Frauds. *Jones*, J., inclined to the same opinion, but rested his judgment on the ground that the Will, even if sufficiently attested, gave the widow no more than a life estate.

But in 1815, the Supreme Court of Calcutta, in *Doe d. Arratoon Gaspar v. Paddolochum Doss* (p), held the eldest son of Gaspar Arratoon, an Armenian, and who, while an infant, had joined his mother, the widow and executrix of Gaspar Arratoon, in selling and conveying after his death, by Bengali bill of sale, a house and premises in Calcutta to the defendant's sister, entitled to recover them in ejectment. The Advocate General, for the defendant, contended that the widow, as executrix, had power to sell the house and premises,

(p) East's Notes, No. XIX., 2 Morley's Dig. 30.

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"real property in India being on the same footing as personality, and equally liable to executions for simple contract debts, &c." But the Court said: "As to the doctrine, attempted to be sustained by the Advocate General, that in the case, as this was, of an Armenian family, which is just the same with British subjects as to the laws of property in India, recognized real property is to be considered exactly as personality, the Court entirely dissented from it, and said that the power given under the charter cited to seize realty in execution, was merely a power given to the Court, and not by any means to the executor or mere personal representatives, as it distinctly appeared by the words there used, viz., 'after judgement'; so that though the Court *may* do so at their discretion, the executors cannot *mero motu*." The Advocate General declared that this decision would invalidate many titles to realty in India, and overrule many judgments of the Supreme Court; but the Court denied this, and gave judgment for the lessor of the plaintiff, with costs. And in the year 1816, in the case of *Maria Zora, survivor of Stephen Carapit, v. Moses Cache Carraky (p), East, C.J.*, reserved his opinion how far lands were made assets generally in the hands of executors and administrators, which was touched upon in the argument; not being satisfied that the charter (1774) had made them such generally, but only *sub modo*, under a writ of execution issued by the Court for debts recovered by judgment.

However, in *Joseph v. Ronald (q)*, decided in 1818 at Calcutta, *East, C.J.* (with much doubt and difficulty, and, as he said, trembling at "the accumulated implications" from the language of the charter [1774] which he found it necessary to make in order to arrive at such a result), and Sir Anthony Boller, adhered to the doctrine laid down in *Doe d. Savage v. Bancharam Tagore*, that the executor or administrator of a deceased person, not being a Hindú or Muham-

(q) East's Notes, No. XLIX., 2 Morley's Dig. 70, 72.

(r) Cited in 1 Moore's Ind. App., pp. 310, 313, 314, 315, 320, 345; and in *Jebs v. Lefevre*, Clarke, Add. Rules & Cases, 62 c, 62 i.

madan, took an estate in lands and houses (held in perpetuity in Calcutta), for the benefit not only of judgment and specialty creditors, but also of simple contract creditors, and not a bare power of sale without an interest; and that, after those creditors were satisfied, the executor or administrator held the property, subject to the dower of the widow, for the heir at law. *Macnaghten*, J., dissented as to the last proposition, and was of opinion that lands in Calcutta were of the nature of chattel, and would, after payment of debts, go to the next of kin, according to the Statute of Distributions. We cannot discover that his view has ever found favour with any of the previous or subsequent Judges at Calcutta. Lord *Lyndhurst*, in *Freeman v. Fairlie*, says that he had read through the reasons assigned by Sir F. Macnaghten for his judgment, but that they were very unsatisfactory to his mind (s). Master Stephen had previously, in his Report, said that Sir F. Macnaghten's "construction of the Charter is utterly irreconcileable with the words of that instrument itself, which expressly describes real actions, and directs the sale by execution of real as well as personal property."

In *Gardiner v. Fell* (t) the lands were situate at Barrisaul, in Bengal, tenure of them by the testator under a zamindár was evidenced by pottahs; the testator had a perpetual right of occupancy, subject to the payment of certain fixed annual rents to the zamindár, and to forfeiture in case of nonpayment. The zamindár held the same land under Government by a similar tenure. Sir William *Grant*, M. R., by his decree in 1817, referred to the Master to inquire what was the nature of the interest which the testator possessed in lands, and whether they passed by his Will attested by two witnesses. The Master reported that the interest of the testator in the lands was in the nature of fee simple, and that no part thereof passed by his Will attested by two witnesses. The report was confirmed, and the cause coming on for further directions before Sir Thomas *Plumer*,

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(s) 1 Moore's Ind. App. 345.

(t) 1 Moore's Ind. App. 299; S. C., 1 Jacob & Walker 22.
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M. R., in 1819, he said : " Next, to consider the true meaning of this report. The estate is said to be of the nature of fee simple; that is, it possesses the quality of a fee simple estate; it must, therefore, have the quality of being descendible to the heir. How can it be of the nature of fee simple unless it descend to the heir at law? It is an estate of inheritance, and if such, the rules and doctrine of estates of inheritance must be applied to it. All this must have been known and felt by the Judge who directed the inquiry; for otherwise his decree would have been defective." Thus these lands in Barrisaul, in the Bengal Mofussil, were, by the Rolls Court in England, held to descend upon the heir at law of the testator, and not to pass under his Will, it not having been, in accordance with the 5th section of the Statute of Frauds, attested by three witnesses.

Next in order comes Master Stephen's report made in *Freeman v. Fairlie* (*u*) in 1823. He, under a reference in that suit, which was in the Court of Chancery in England, reported that lands held in perpetuity by Thomas Oldham, a British subject, in Calcutta, were of the nature of freehold estate of inheritance; that a difference of opinion existed amongst the Judges at Calcutta on the subject; and that, although he adopted the general conclusion of the majority, he dissented from their reasons. His views as to the introduction of English law into India, we have already casually mentioned, in speaking of the *Lex Loci* Report of 1840. The investigation being in England, he took evidence as to the law of Calcutta, and stated the result to be that lands and houses in Calcutta, whatever their tenure, or the nature of the estate in them which an absolute proprietor possessed, were liable to be sold under executions at law obtained against him in his lifetime, were chargeable with his simple contract as well as his specialty debts at his decease, and might not only be sold for satisfaction thereof, under execution against his executors and administrators, without joining the devisee or heir at law, but that an executor or administrator might

(*u*) I Moore's Ind. App. 305.

sell them for that purpose by his own voluntary act, and that a conveyance by him without the concurrence of the heir or devisee would give a good title to the purchaser (*v*). But, although holding those points as to the liability of lands to payment of debts, and the right of the executor to sell for that purpose, to be established, and that so much of the English law of real property as opposed those practices was not applicable to the local circumstances in which the new settlers were placed, and, therefore, not binding on them, Master Stephen deemed those practices to be merely a partial adoption, by the English settlers, of the existing laws and customs of the country, possibly for reasons of commercial policy, and thought that, notwithstanding these exceptions, there was a general adherence to English law, and that there was no sufficient reason for departing from the rules of that law as to the inheritance of real estate; and, therefore, that if lands and houses were not applied in payment of debts, or if a surplus of the proceeds of sale remained after payment of debts, such lands and houses or surplus went to the heir at law. Without repeating his arguments in detail, we shall content ourselves with saying that to our minds they appear to outweigh the reasoning by which Sir A. Anstruther in 1817, and Mr. Justice Hore in 1864, arrived at the conclusion that there was not any freehold estate in the island of Bombay. Master Stephen also shows that the analogy, which some of the Judges at Calcutta imagined to exist between the alleged powers of executors and administrators in Calcutta, and the powers of executors and administrators in the British colonies in America and the West Indies, rested on a completely erroneous supposition, on the part of those Judges, that executors or administrators in those colonies could sell and dispose of the real estate of their testator or intestate, by their own voluntary act and conveyance; the fact being that they could not do so even for the necessary satisfaction of his debts (*w*).

(*v*) Notwithstanding those findings, it will be seen that some of the propositions thus laid down were subsequently denied by Sir C. Grey, C.J., in *Jebb v. Lefcure*.

(*w*) 1 Moore's Ind. App. 316 *et seq.*

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In the interval between the date of Master Stephen's report in 1823 and the ultimate decision of that case in 1828, the case of *Jebb v. Lefevre* (x) was decided in Calcutta, at the end of 1826 or beginning of 1827. The facts stated in the special case were briefly these:—"On the 20th July 1824, George Rowland died intestate, in Calcutta, of which place he was a native, born in wedlock of native parents, of Portuguese descent; he left a widow, Caroline Rowland, and a son, George Henry Rowland, an infant aged one year, both of whom are living; the widow obtained letters of administration from the Supreme Court, and afterwards married Charles Lefevre, against whom and herself, as administratrix, this action was brought upon a promissory note of the intestate. The defendants pleaded that they had no goods or chattels of the intestate; and the plaintiff, at the time of the trial, was unable to prove any assets, except that George Rowland, at the time of his death, was the owner of several parcels of land and houses, some within the town of Calcutta, and others in the neighbourhood. Some of these had been conveyed to him by lease and release, to hold to him and his heirs; others by instruments known in Calcutta by the name of Bengalee bills of sale, and which have always been treated, amongst the natives of Calcutta, as conveying the entire interest in lands as between the vendor and vendee, and also, as Bengalee bills of sale, severally contained clauses releasing to the vendee all claims from the vendor and his heirs; under which said bills of sale the said George Rowland obtained actual possession of the said lands, and was possessed thereof at the time of his death. These several parcels of land and houses of which George Rowland was the owner, were at the time of the trial in the occupation of the defendants, and the question reserved for argument was, whether the estate, property, or interest of George Rowland in these lands, or any of them, was assets to be administered by his administratrix for the payment of his debts." We gather from the judgments that all of the arguments, relied on by Sir A. Anstruther and Mr. Justice Hore, and other arguments also, were then put forward in support of the propo-

(x) Clarke's Addl. Rules & Cases 56.

sition, that the lands of George Rowland were assets to be administered by his administratrix, for the payment of his debts, as well of simple contract as of higher degree. Amongst those arguments were, that there was no distinction between lands and goods in respect of the succession to them; that colonies are only "instruments of commerce;" that most of our legal distinctions between land and goods have their foundation in the feudal system, which, including the law of primogeniture, is supposed to be ill adapted to commercial communities; that the object of the East India Company at first was trade only, and the possession of territory; that no subject of the Crown could come here but by their licence; and that, as the heir would seldom be in this country at the death of the ancestor, it was improbable that the King or Parliament intended to create or recognise any estates of inheritance; that the charters of justice, by which British courts have been constituted in India, do not speak of such estates, and none of them make mention of heirs, though several, and especially that of 1774 (Supreme Court, Calcutta), recognise executors and administrators, and make lands liable to be taken in execution for all debts. The three Judges who heard that case, to a certain extent differed in opinion, Sir Charles *Grey*, C.J., in an extremely able judgment, holding that the administratrix took neither an estate in, nor a power of sale over, the lands, but that an estate of inheritance in them vested immediately upon the death of Rowland in his heir. Sir Anthony *Buller*, J., who was one of the Judges who decided *Ronald v. Jacob*, adhering to his opinion in that case, held that the lands went first to the administratrix, but, after payment of debts, would be (as he said had been previously held) liable to dower, as well as to all other rights incident to freehold property, and that equity should decree her to deliver over the lands to the heir. Sir John *Franks*, J., in a judgment of great ability, held that lands in Calcutta may be sold in a suit by even a simple contract creditor of the deceased, against the executors or administrators, without joining the heir; and further, that, inasmuch as that was

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so, therefore the executors or administrators may sell them for payment of debts without suit, but that for that purpose they took a mere power over, and not an estate in, the lands. He says : "It is a rule of equity that a trustee may do without suit whatever he would be compellable by suit to do ; and as it was the intention of the Charter (1774) to give a more speedy and efficient remedy to creditors for recovery of their debts, this Court ought to give to creditors the benefit of such rules of interpretation for the advancement of that remedy. But it is not necessary to decide that the heir shall not take estates that would be inheritable in England by inheritance here, in order to advance the remedy of the creditor. The law may give a power to the executor or administrator over the estate without breaking the descent to the heir, and it appears to me to have done so by this charter, for the purpose of providing a better remedy for creditors. But I do not think it ought to be held to have done more, or to have effected the tenure of estates of inheritance ; and it would be an interpretation of the charter venturesome and unnecessary to hold that it had altered the tenures of such estates. It is not necessary to the creditor to give it such an interpretation ; provisions made by the charter would be left nugatory. It has provided real actions amongst the remedies for the subject here." He subsequently points out that the word "heir" is not mentioned in the charter, nor has the Legislature or the charter expressed an intention to disinherit the heirs of British subjects, or subjects capable of enjoying the rights of British subjects, in the Presidency of Fort William. That were the Court to hold that they were disinherited, it should do so by implication, but that "according to decisions, early, and recognised without interruption, it has been uniformly held that an heir at law shall not be disinherited by implication : *Gordon v. Sheldon (y).*"

He concluded thus : "Upon the whole of this case it appears to me, that British and Christian subjects of His Majesty the King of Great Britain are capable of acquiring

(y) Vaughan R. 262.

estates of inheritance within this Presidency ; but that the quantity of estate, or tenure of each subject, must depend upon the quantity of estate the grantor to him had to convey, and the terms of the conveyance made to the grantee ; and that, in the present case, from the terms of the instruments whereby the late George Rowland derived title to the estates in question, his creditors have a right to act towards these estates according to the tenures, by which he admitted himself proprietor of them ; that the plaintiff has a right of action, admitted by the *Defendant's Plea*, and a power to sell those estates by virtue of an execution, pursuant to the 15th Section of the Charter of 1774, if he should issue execution. And that the defendant, the *administratrix*, has power to sell the *land*, by operation of that section of the Charter, and thereby to acquire funds for payment of debts : and that it is a power, given thereby to personal representatives, to be exercised over the estates of ancestors who die indebted, and leave estates of inheritance that descend to Heirs, debts remaining unpaid. And I conceive the plaintiff is entitled to judgment."

Thus it will be seen that although the Judges differed as to the position of an executor or administrator with regard to the real estate, they were unanimous in holding that, ultimately at least, the heir at law, and not the next of kin, became entitled to it.

One of the results of that case was, that, on the 27th of Juno 1828, was passed the Stat. 9 Geo. IV., c. 33 (commonly known as Fergusson's Act), which, after reciting that doubts had arisen "whether and to what extent the real estates of British subjects *and others* (not being Mahomedans or Gentüs), situate within or being under the jurisdiction of His Majesty's Supreme Courts of Judicature in India, are liable, as assets in the hands of executors and administrators, to the payment of the debts of their deceased owners," and that "it is expedient that such doubts should be removed," enacted (z) "that whenever any British subject shall be seized of or entitled to any real estate in

(z) Sec. 1.

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houses, lands, or hereditaments situate within or being under the general civil jurisdiction of H. M.'s Supreme Courts of Judicature in Bengal, Fort St. George, and *Bombay* respectively, or whenever any person (not being a Mahomedan or Gentú) shall die seized of or entitled to any such real estate, situate within the local limits of the civil jurisdiction of the same Courts respectively, such real estate of such British subject or other person as aforesaid (not being a Mahomedan or Gentú) is and shall be deemed assets in the hands of his or her executor or administrator, for the payment of his or her debts, whether by specialty or simple contract, in the ordinary course of administration." The 2nd section empowered the executor or administrator "to sell and dispose of the real estate for the payment of such debts as aforesaid, and to convey and assure the same to a purchaser in as full and effectual a manner in law as the testator or intestate," &c., "could or might have done in his lifetime." Sec. 3 rendered the executor or administrator, in actions brought against him for debts of his testator, &c., chargeable with the net proceeds of the real estate (when sold by the Sheriff), as assets to be administered. The 4th section enabled the courts in such actions to sequester or sell, by way of execution, houses, lands, or real effects in the hands of the executor, in the same manner as in the lifetime of the testator or intestate. The 5th section declared conveyances theretofore made by executors or administrators to be valid. The 6th section provided "that neither this Act, nor anything herein contained, shall be construed to operate as, or have the effect of, changing or altering the legal quality, nature, or tenure of any lands, houses, estates, rights, interests, or any other subject of property whatsoever, or of making the same, or any of them, to be of the nature of real property, if by law, before the passing of this Act, the same or any of them were personal property; but that the law in that respect shall be and continue the same as if this Act had not passed" (a).

(a) As to sales under that Statute, see *Doe d. Cullen v. Clark, Morton* Rep. 76.

In *Stephen v. Hume* (b), *Malkin*, J., said that statute "clearly applies only to the case of persons strictly and technically described as British subjects, except when the lands are situated within the local jurisdiction of the Supreme Court. It does not, therefore, affect the present case of an Armenian Christian at Dacca."

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About eighteen months after the decision in *Jebb v. Lefevre*, but apparently without being acquainted with that case, Lord *Lyndhurst*, before whom, in 1827, the exceptions to Master Stephen's report in *Freeman v. Fairlie* had been argued, gave judgment upon them, on the 17th of November 1828. He confirmed the Master's report, and held that Samuel Oldham had a freehold estate of inheritance according to the acceptance of those terms by the law of England. Lord *Lyndhurst* was of opinion, although the contrary had been contended, that the Native proprietors of the soil had a permanent interest in it at the time when the English first established themselves on the banks of the Hooghly; that the law existing at Calcutta when he gave his decision was the law of England, and that the English had carried it there with them, and acted on it, as it was almost impossible for them to adopt the Muhammadan or Hindú laws, blended as they were with their respective religions; and that from 1601 downwards it appears, by Charters and Acts of Parliament (and he referred particularly to the charter of 1726), that the English law had been considered as the law of the settlement as regarded British subjects. He next held that if the permanent interest of the native proprietor be transferred to and vested in a British subject, and the case be governed by English law, such an interest is an estate of inheritance descending to the heirs. He says: "If it appears in the evidence to be an absolute ownership, what law is to be applied to it? Those who contend that it goes to the personal representatives, *in a degré* apply to it the English law; because the law as to personal representatives is an

(b) *Fulton R.* 231. As to the question whether it is declaratory or not; see a difference of opinion in the same case between *Malkin*, J., and *Grant*, J.

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English law. If, then, we are to apply to it the English law, if the absolute ownership of the soil is possessed by the party, and the English law is in any shape to be applied to it, the party must take a fee simple, and the property will descend to the heirs." This is an argument quite as applicable to Bombay as it was to Calcutta. Lord Lyndhurst also, in support of his decision, relies upon the evidence taken by the Master, and upon the previous decisions of the Supreme Court at Calcutta. In referring to the evidence, he lays some stress upon the fact that, constantly since 1774, lands had been conveyed by lease and release in Calcutta, and that it had also been shown that fines had been levied of lands of the description there in contest. But, with the greatest possible deference to the remarks made in *The Mayor of Lyons v. The E. I. Company* upon *Freeman v. Fairlie*, we think that it will be found, on perusal of his judgment, that Lord Lyndhurst drew the bulk of his arguments from other sources. And we are strongly inclined to think that if there had not been any evidence whatever of conveyancing at Calcutta by lease and release, the decision would have been the same. Master Stephen says (c): "It appears incidentally before me that, prior to the establishment of the Supreme Court, conveyances by lease and release, or other English forms, were little, if at all, in use upon the sales of lands or houses from one British subject to another, but a brief note of the sale and transfer was used in their stead." He had previously spoken of the ordinary pottah taken by the landholder and the E. I. Company, but he (and Lord Lyndhurst concurred in his view) (d), regarded it as evidence of holding according to a local and fiscal regulation, and not as a conveyance (e); but Master Stephen held that, in the special case of a pottah of common or untenanted land, it was the only conveyance or evidence of title, and that the purchaser under it from the Company obtained at least an equitable fee. He further was of opinion (f) that the only written evidence of grants from the Native sovereigns to zamindars or other proprie-

(c) 1 Moo. Ind. App. 338.

(d) *Ibid.* 345, 346.

(e) *Ibid.* 335 *et seq.*

(f) *Ibid.* 338.

tors of land was a pottah, in the same form as since used by the Company for the same purpose. For British subjects it seemed to him "a natural if not a necessary course" to use the same means that they found to be established for granting and transferring lands and houses, at what he conceived to be "the true era of the tacit introduction of the English Law, namely, the first establishment of the Company's settlements in India, till long after which they had no regular Courts, and probably no practitioners of law capable of preparing conveyances in the English form." The Master, accordingly, reported that the pottah, when it performs the functions of a grant, as in the case of common lands, by the Company, may be considered as a sufficient creation or evidence of title in fee. And so Lord Lyndhurst held, saying (g) "That the East India Company, when they convey these small portions of land in the way I have stated, without executing deeds of lease and release, or any conveyance beside authorizing the Collector to issue the pottah, consider they are conveying the absolute property in the soil, is quite clear from the evidence." We should observe that the Calcutta charter of 1774, although conveyances by lease and release, or other English forms, were then, as Master Stephen says, little if at all in use, treats of real estate as then existing in Calcutta, and subjects it to seizure and sale in execution. Lord Lyndhurst relies, in that particular, upon the charter, referring to which he says: "We find in the language of it a distinction expressly drawn, and in terms, between personal and real property. It has, I think, been said, by one of the learned Judges to whom I have referred, or it has been glanced at, that that may be satisfied, by considering this property as a chattel real; but, looking further into the Charter, it will be found that this explanation will not avail, because the Courts have jurisdiction expressly and in terms, in all actions and pleas, real, personal, and mixed; a recognition, therefore, by the Crown (the highest authority), that real property exists in that country, according to the meaning of that term as used in the law of England."

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In *Doe d. Savage v. Tagore (h), Chambers, J.*, in the year 1785, said: " It has been urged that titles might be endangered if lands and houses in Calcutta should be considered real property, because they have been transferred by instruments which would not be sufficient to convey real property by English law; but this danger is only ideal. The lands and houses of British subjects have usually been conveyed, in this settlement, by deeds of lease and release, or by *bargain and sale*. The title by lease and release depends on the Statute of Uses, which is a remedial Act, and has always been considered by this court as applicable to the lands of British subjects in this country. The conveyance by deed of bargain and sale would indeed be endangered by the Statute of Enrolments (27 Hen. VIII., c. 10), if the latter extended hither; but the Court are of opinion that it cannot be so extended, because its provisions are inapplicable to this country. A mere bargain and sale of land is, therefore, sufficient here to convey an estate in fee, as it would have been in England under the Statute of Uses, if the Statute of Enrolments had not been passed." And in *Jebb v. Lefevre*, part of the property in which Rowland was held to have an estate of inheritance descendible to his heirs, was held, not under lease and release, but under Bengáli bills of sale, a species of assurance which in Calcutta had been always treated as conveying the entire interest.

Mr. Justice Hore would, I may here observe, have been more accurate if, instead of saying that deeds of lease and release are entirely unknown in Bombay, he had said they were extremely rare. Several years ago, so many that memory does not enable me to specify the property to which they related, further than that it was situated in the Mazagon or Chinchpoogly district, I met with two instances in Bombay of conveyancing by lease and release; the documents in both cases bearing dates of the eighteenth century, about the time when Mr. Hornby was Governor of Bombay.

We are quite unable to concur in the learned Judge's statement that conveyances executed in Bombay since the

(h) *Morton R. 72.*

passing of Act IX. of 1842 (i) very seldom refer to that Act, our experience being that conveyances of an absolute estate, prepared by professional men in Bombay, as a rule, generally purport to have been made in pursuance of that Act, and to be releases of the property the subject of them. It is unnecessary to travel out of this suit for an example. The conveyance of the 12th of February 1859, put in evidence by the defendant, and under which he and his wife derive their title to the premises as to which this suit has been instituted, purports to be made in pursuance of that Act, and to release those premises.

The supposed inconsonance of liability of the land to sale, by way of execution, or by the executor or administrator for payment of simple contract debts, with the English rule of inheritance, seems to have weighed as heavily with Sir A. Anstruther as with the one Calcutta Judge, Sir F. Macnaghten, who maintained that all immoveable property at Calcutta was of the nature of chattel. We believed that the decisions in *Jebb v. Lefevre* and in *Freeman v. Fairlie* had put that objection finally to rest, and were therefore surprised to find it revived by Mr. Justice Hore. Lord Lyndhurst says he never felt the weight of it. Putting the case of an Act of Parliament passing for England similar to Fergusson's Act, which had passed for India in the previous session, he says: "It would render real property assets for the purpose of paying the simple contract debts of the testator or intestate, but it would not alter the tenure of the land; the land would still be inheritable: it still would descend to the heir at law." He adds: "If it were introduced by competent authority, it would be a charge or liability engrafted or imposed on the real estate, to which otherwise it would not be subject. In what way it was introduced does not, I think, very clearly appear." Stating that he concurs with the Master in not being perfectly satisfied with the arguments which refer its introduction to the charter, he proceeds: "I think it not improbable

(i) Extending to India the Stat. 4 and 5 Vic., c. 21, being "an Act for rendering a release as effectual for the conveyance of freehold estates as Lease and Release by the same parties." So early as 9 Geo. II., c. 5, an Act with a similar object was passed in Ireland.

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that it crept in at a very early period, when the law was not much attended to in that country : it got established by use ; it was continued as being found convenient ; and perhaps it has no legal origin ; it now has, however, the sanction and authority of an Act of Parliament. If it had a legal origin, it appears to me that it would not affect the decision of this question ; if it had not a legal origin, still less would it affect it ; the only way in which it can be used at all is as an argument that, it being an incident to personal property to be applicable to payment of debts, this should be considered personal property ; but, as an argument standing alone, I think it weighs very little in opposition to the weight of argument and evidence on the other side." We shall presently refer to the " argument and evidence" specially relating to Bombay, but at present continue our enumeration of the Bengal and Calcutta authorities.

In *Hoo v. Marquis* (*j*) the Bengal Sadr Adálat, in 1827, on the authority of *Gardiner v. Fell*, and after consulting the Advocate General, held as invalid the sale, by an administratrix, of real estate situated in the Bengal Mofussil, the property of the intestate, her husband, who was an Englishman, and decreed that his son should recover it ; but, owing to certain equitable circumstances in the case relating to the application, for the benefit of the plaintiff, of the purchase money paid by the defendant, put the plaintiff under terms to repay the defendant the purchase-money.

In 1834 Sir B. *Malkin* reluctantly held that the charter of the Recorder's Court at the Straits Settlements abrogated the Dutch law at Malacca : *Rodyk v. Williamson* (*k*). The reasoning which brought him to that conclusion is equally applicable to the abrogation in Bombay of the Portuguese law by the charters of the Mayor's Court, the Recorder's Court, and the Supreme Court. Speaking of the exceptions in the two latter charters in favour of Gentús and Muhammadans at Calcutta, Madras, and Bombay, he says :

(*j*) 4 Mac. S. D. A. Rep. 243.

(*k*) Mentioned in the goods of *Abdulla deceased* Morton Rep. 19, 20. As to the abrogation of Portuguese law see *Perry's Oriental Cases*, 60, 332. 573.

“The benefit, if it be one, is confined to Mahomedans and Hindus, and is limited to certain classes of rights and privileges.”

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In *Emin v. Emin* (*l*) an Armenian widow was, by the Supreme Court at Calcutta, decreed dower out of the lands of her deceased husband in the Mofussil; a decision which Sir Henry Seton, J., in *Musleah v. Musleah* (*m*), said “must have proceeded, not on the ground of any personal law applicable to the parties as British subjects; this Court (Supreme Court, Calcutta) having no jurisdiction to administer the personal law of the parties except in the case of Hindus and Mahomedans, but on the ground that the parties and the property being alike subject to the jurisdiction, and the parties not being within the exception, the English was the only law which the Court was competent to administer between them. For this purpose there can be no distinction between Jews and Armenians, neither being within the excepted classes. The law of England makes no distinction between Jews and other persons, except as to their laws of marriage, and as to certain incapacities for office (*n*). Their law of descent must be governed by the tenure of the lands to which it is incident, and where this is quasi freehold, as it is found to be by the decisions of this Court and those of the Court of Chancery, which are binding on it, the law of primogeniture must prevail. If the lands in question had been held by any customary tenure subject to the Jewish law of descent, the case might have been different.” In that case of *Musleah v. Musleah*, the majority of the Judges ruled, in 1844, that lands situate in the Bengal Mofussil belonging to a Jew who died domiciled in Calcutta, must by the Supreme Court be held to descend according to English law, and decreed, accordingly, in favour of his eldest son and heir at law. *Grant, J.*, dissented (*o*), being of opinion that “the immoveable property situated in the Mofussil

(*l*) Referred to in *Stephen v. Hume*, Fulton R. 227. See also *De la Cruz v. Goorachund Seal*, Cl. R. (1829) 335; 1 Morley Dig. 300, plac. 97.

(*m*) Fulton R. 423, 441.

(*n*) See per Lord Stowell in *The Indian Chief*, 3 C. Rob. 32.

(*o*) *Ibid.* 438.

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must descend according to the law of the Mofussil (thereby meaning the law of the Mofussil courts); in the same manner with the moveable property there situated, if any; and both must descend according to the law regarding moveables of the domicile of the deceased;" and this he presumed to be "the law of England for the distribution of personal property." Taking the deceased to be domiciled in Calcutta, *Grant*, J., admitted that the immoveable property situated in Calcutta must go to the heir at law, by right of primogeniture, subject to payment of debts under Fergusson's Act. *Peel*, C.J., as to the Mofussil lands, concurred with *Seton*, J., in holding that there was no *lex loci rei sitae*, and, therefore, they were bound to decide by the *lex fori*. He mentioned, as decisive of the question, *Gardiner v. Fell*, and the *Mayor of Lyons v. The E. I. Company*, which latter case he considered as a direct authority that English law is to be applied in a suit in the Supreme Court to the question of the right to exercise the testamentary power over lands in the Mofussil belonging to a Frenchman, although a Mofussil court would have applied the law of the domicile of origin, the French law. Pointing out the jurisdiction of the Supreme Court to try causes relating to lands in Bengal, Behar, and Orissa, he says: "The local boundaries of Calcutta circumscribe its jurisdiction over persons, not over things. The laws by which it is to decide are prescribed. It has no discretionary power, is not a Court of conscience, and must decide by those laws alone which are ordained for it. *The general law of the Court is the English law. The exceptions are statutory, and the introduction of those very exceptions prove the general rule.* The Courts of the East India Company are concurrent, and not exclusive, Courts. Their course is prescribed by Regulation." He shows that their Regulations, so far from enjoining any general law, prohibit them from the adoption of any such law, either English or Foreign, as their *lex fori*; their decision, therefore, cannot be viewed as evidence of any general law. As to the Supreme Court he said: "A British subject has no special privilege in this Court to have a special law applied to his case. The same law applies to all, and the

law of descent is one and the same for all of the suitors of the Court, except Hindus and Mahomedans." He concluded by deciding reluctantly in favour of the exclusion of the younger children by the eldest son.

On a rehearing of that cause in 1857 before *Colvile*, C.J., *Buller*, J. and *Jackson*, J., the former decision was by them unanimously affirmed (p).

In *Abraham v. Abraham* (q) Lord *Kingsdown* says that the Mofussil Courts have, properly speaking, no obligatory law of the forum, as the Supreme Court had.

Storm v. Homfray (r) was a case before the Supreme Court of Calcutta in 1849 and again in 1850. On both occasions, *Peel*, C.J., lays it down that there can be no doubt that British subjects litigating in that Court as to the title to immoveable property, though situate in the Mofussil, must have their right [determined by the law of England, so far as it had been introduced here. He admits, both in that case and in *Sibchunder Doss v. Sibkissen Bonnerjee* (s), that when immoveable property is in question, English law incorporates into it a *lex loci rei sitae*, and local customs prevailing in greater and less degree, and whether relating to succession or enjoyment (t).

In the recent case of *Rigordy v. Smith* (u), *Phear*, J., citing *Abraham v. Abraham* (v), *Musleah v. Musleah*, and *Freeman v. Fairlie*, held that where persons neither Muhammadans nor Hindus, though not, strictly speaking, all of them European British subjects, had adopted the law affecting European British subjects in India, their real estate, as well in Calcutta as in the Mofussil of Bengal, descended to the heir at law.

(p) *Boulnois* R. 234. (q) 9 *Moore's Ind. App.* 240.

(r) 1 *Taylor and Bell*, 49, 331.

(s) *Boulnois* R. 74. And see per *Colvile*, C. J., in *Musleah v. Musleah*, *Boulnois* R. 239.

(t) 1 *Taylor and Bell* 334, 52.

(u) *Ind. Jur.* 290, decided 1866.

(v) 9 *Moore's Ind. App.* 195. For an application of the English doctrine of advancement, between a father and daughter of English extraction in the Mofussil, see *Kishen Koomar Moitro v. Stevenson*, 2 *Calc. W. R.* 141.

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Sir Alexander Anstruther regarded with much apparent alarm the possible application of feudal doctrines to Bombay, or any other part of British India. He does not, however, seem to have been aware that when Bombay belonged to the Portuguese the tenure of lands was feudal.

Mr. F. Warden, Chief Secretary to the Government of Bombay, in his impartial and elaborate Report on the Land-ed Tenures of Bombay, which he made to Government in 1814, shows that the ancient constitution of the island was feudal, and that the lords of it could claim the military services of the tenants, until the year 1718, when an annual payment or rent, specially denominated "tax," was substituted (*w*). That rent must not be confounded with the chief or quit rent of one-fourth part of the profits previously paid to the King of Portugal, as seigneur of the island, and afterwards commuted for 20,000 xeraphins annually payable, under its ancient name of pension, by virtue of Governor Aun-gier's Convention of 1672 (*x*). In the London Company's reply (*y*), dated the 18th of March 1691, to the Portuguese Envoy, the liability of all of the landholders in the island, whether lay or ecclesiastic, by themselves or their substitutes, to render military service, was fully insisted upon, as was also the right of Government to treat any landholder, who refused military aid, as having forfeited his land.

The lands of the Jesuits, and others who refused to render such military service, or who intrigued with the enemies of the Company, were, accordingly, confiscated (*z*). To some of the less grave offenders their lands were afterwards restored (*a*). Amongst those which were never restored were the lands of the Jesuits at Sion and Parell (*b*). Ráma

(*w*) Paras. 53, 71, 72, 73, 74, 173 (pp. 16, 23, 24, and 40 of the printed ed.); and see Perry's Oriental Cases 496, 534.

(*x*) The two payments have for a long time past been made together, and appear in the Collector's books and receipts as "pension and tax."

(*y*) 3 Bruce's Annals 104, 105; Warden, paras. 53, 55 (pp. 16, 17, of the printed ed.).

(*z*) 3 Bruce's Annals 95, 104; Warden, paras. 18, 51, 52, 65 (pp. 6, 16, 21, of the printed edition); Anderson 288, 353.

(*a*) 3 Bruce's Annals 164.

(*b*) Warden, para. 65, p. 21; Anderson 288, 353.

Kámáti's lands were also confiscated in 1720 (c) ; Sir E. Perry, C.J., gives some account of his trial (d).

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Whether any new patents were made out, under Article 2 of Governor Aungier's Convention, I have not been able to discover. With the exception of the patents of one estate, I have not succeeded in obtaining any information as to the old patents of dates prior to the cession of the island to Charles II.

The exception of which I speak are letters patent bearing date the 3rd of June 1637, granted by Don Philip, King of Portugal, to Bernardin de Tavora, and purporting to be a "Charter of Confirmation and of Gift and Investiture in Chief (Emcabecimento)," an elaborate and lengthy document. The subject of the charter was the well-known district, Mazagon. Bombay was at that time sometimes called the island of Bombaim, but quite as frequently described as the island of Mahim. Accordingly the estate is in the charter described as "the Village Mazagaõ, which is in this island of Mahim, dependency of Bassein." From preliminary recitals I gather the following facts. The village had, for some time previously to the year 1571, been leased on some terminable interest, either for lives or years, to Don Antonio Pessoa, by the Portuguese Governor, Don Joaõ de Castro. Lionel de Souza married Donna Anna Pessoa, daughter of Antonio Pessoa. Her father having died in, or previously to, 1571, the village was, by order of Don Sebastiaõ, then King of Portugal, leased on lives to Lionel de Souza by Don Antonio de Noronha, Viceroy of India in 1571, at the same annual rent which Lionel de Souza's late father-in-law, Antonio Pessoa, had held it, viz., "195 Pardaõs of gold and three tangas of silver, at the rate of six double pice and one quarter the silver tanga," payable quarterly. In compliance with the subsequent request of Lionel de Souza, King Sebastiaõ, having regard to the age and merits of Lionel de Souza, who had served him for many years in various

(c) Warden, para. 66, pp. 21, 22, printed edition ; 1 Perry, Or. Ca. 574.

(d) Perry, Or. Ca. 65. See also Vol. 3 Bom. Quar. Rev. for 1856, p. 48. Two of the witnesses at the trial were put to the question.

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parts of India "as a Captain of his vessels at his own expense," as well as "in company of the King's Viceroys and Governors of India in any other things with which he is charged by the said Viceroys and Governors, by reason of the great experience that he has of the country, and the length of his service therein," granted, through the Viceroy, Don Antonio de Noronha, to Lionel de Souza, letters patent, dated the 18th of January 1572, conferring upon him the said village, to hold at the former rent as "a quit rent" by the tenure of *emphyteusis* for ever (*em fatista para sempre*) (e), with remainder on his death to his wife, Donna Anna, as chief tenant. She was, however, to pay a moiety of the rents and profits to her and Lionel de Souza's two sons, Ruy and Manoel de Souza, and to answer for the quit rent to the royal officers at Bassein. On her death the village was to "remain in his (Lionel de Souza's) said sons, vested in the elder as head or Chief Tenant." Then followed a long and not very clearly penned limitation, in favour of the sons of the elder son and their issue, with a remainder over, on the exhaustion of his issue, to the other son and his issue, and, on the failure of "heirs descendants" of those sons, to the heirs and successors of the survivor, with remainder to such descendants of Lionel de Souza as he should by will nominate. The letters patent of 1572 permitted Lionel de Souza to reside at Choul, but directed that he should repair to Bassein when the King's "service is to be done." Referring to Mazagon, the letters patent proceeded thus: "The which Village it shall not be in his power to sell, exchange, or to alienate without the King's leave, or that of his Viceroy," nor could it be divided, but should

(e) *Emphyteutical grants or leases are either perpetual, or for a long term of years, on condition that the grantee or lessee of the lands should cultivate, plant, and otherwise improve them, as the word *emphyteusis* signifies. Such grants are subject to conditions as to liability to quit or ground rent and other charges, and as to alienation, according to the diversity of the grants, and according to the custom or usage of the place where the lands are situate. Although tenure by *emphyteusis* seems to have been restrained by its primitive institution to barren lands, yet it has been also applied to fruitful lands, and to houses and buildings. An estate held in *emphyteusis* in perpetuity is transmissible to the heirs and assigns of the grantee: Domat, Civil Law, plac. 544, 545, 546, 547, 548, 549, et seq., Cushing's edition of 1853. The grantor of an *emphyteusis* is the *dominus emphyteusos*, the grantee is the *emphyteuta*.*

" go always in one sole person." Those letters patent of 1572, in the concluding portion, seem to have described the Village of Mazagon, and its appurtenances thereby granted, as a manor, and were registered at Goa and at Bassein in 1572, and were produced to and recognised by the officers of the Crown of Portugal in the years 1580, 1583, 1589, 1590, and 1632. By the letters patent of the 3rd of June 1637, which recited the foregoing facts, King Philip of Portugal confirmed to Bernardin de Tavora, only son of Ruy *alias* Luis de Souza by Donna Beatrix de Tavora, "an instrument of assignment and gift" of the said village and its appurtenances (executed, in consequence of his advanced age and consequent inability to administer the village, by his father, the said Ruy *alias* Luis de Souza), to hold the same to the said Bernardin de Tavora in emphyteusis for ever (em fatista para sempre), subject to the said quit rent payable to the Crown of Portugal, "which said village (the letters patent proceeded to say) it shall not be lawful to sell, give, or exchange, or in any other way to alienate, without my leave or that of my Viceroy or Governor of India; nor yet shall it be in the least divided, but shall go always entire in one only person, who shall himself cultivate, and take the uses and fruits it may produce, as his own property, in the same manner that Lionel de Souza and Ruy de Souza, his (Bernardin de Tavora's) grandfather and father, had and possessed the same." Those letters patent appear to have been registered at Goa and at Bassein in the year 1637, in which they bore date. A copy of the English translation of them, whence my knowledge of their contents has been obtained, was annexed to Mr. Warden's Report. The village of Mazagon and its appurtenances formed the principal (f) private estate in the island, and in it we have a clear instance of the adoption of the rule of primogeniture.

According to the Roman law, the emphyteuta, though not *dominus*, had nevertheless *jus in re*, and a true possession

(f) In Deputy Governor Gary's return, made in 1667 to Charles II., of the revenues of the island, the rent (pension) yielded by Mazagon to the Crown is stated at a considerably higher amount than that of any of the other six districts in the island: see Warden, para. 19 (p. 7 of the printed edition).

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within the technical meaning of that term as used by the Roman lawyers. He was entitled to a real action, and at his death his estate or interest was transmitted to his heirs (g). Mr. Sumner Maine, with his usual perspicuity and learning, traces the fief of the Middle Ages to the emphyteusis of the Romans, and more especially to the *agri limitrophi* held by that tenure, on the frontier of the empire along the line of the Rhine and Danube, by the veteran soldiers of the Roman army. He says the emphyteusis "marks one stage in the current of ideas which led ultimately to feudalism" (h).

It is impossible now to say with certainty that many or any other lands than those of Mazagon were held, before the cession, in emphyteusis, but it is certainly worthy of note that the quit rent payable for a large part of the island (the whole of it, probably, which was in occupation or cultivation at the time of the cession) to the Portuguese government, and which was commuted under Governor Aungier's convention, bore the same name of *pensio* (*pensaō*, pension) as that of the annual payment made by the emphyteuta to the *dominus emphyteuseos*.

The repudiated treaty of Mr. Humphrey Cooke contained the following passage: "That although the manor right of the lady proprietrix of Bombay is taken away, the estates are not to be interfered with, or taken away from her, unless it be of her free will; she being a woman of quality, they

(g) Von Savigny on Possession (Sir E. Perry's translation), pp. 77 to 79, *et in notis*, and pp. 214, 215; Mackeldeii *Systema Juris Romani*, Lib. I., cap. iv., plac. 295 to 299 (Leipsic ed. of 1847); Sandars' *Institutes of Justinian*, Lib. II., tit. v., pp. 215, 45; *Domat. Civ. Law*, plac. 544 to 549 *et seq.*; Smith's *Greek and Roman Antiquities*, 2nd ed., p. 458, title "Emphyteusis," by Mr. Geo. Long; and see same title, Eng. Cyc. Arts & Sciences, Vol. IV., p. 869.

(h) Ancient Law, 2nd ed., pp. 299 to 303, chap. viii. See, as to the origin of primogeniture, *Ibid.*, pp. 227 to 243, chap. vii. A controversy has existed amongst jurists whether fiefs are deducible from the emphyteusis. Amongst those who maintain the affirmative are Cujacius, the great civilian of the 16th century (*Observ.*, lib. 8, c. 14, and *De Feud.*, lib. 1, *princip.*), and Sir F. Palgrave, (2 Eng. Com.); and see Selden, *Tit. of Hon.*, 2nd ed., c. i., 23, p. 332. The negative is maintained by Hargrave (note 1, Co. Lit. 64 a) and Hallam (1 Middle Ages, 11th ed., note x., pp. 315, 316.) The affirmative, as put by Mr. Sumner Maine, seems to be the preferable doctrine.

are necessary for her maintenance. But after her death, and when her heirs succeed to the said estates, the English may, if they choose, take them on paying for the same their just value, as is provided in the case of other proprietors of estates; and should the English now wish to take her houses to build forts therewith, they shall immediately pay her their just value."

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Possibly that passage may refer to the then possessor of the village of Mazagon.* But if so, it is right to say that I have not found any other authority for the statement that the manor right had been then resumed. On the contrary, Aungier's Convention mentions the presence of "Signor Alvaro Perez de Tavora, Lord of the Manor of Mazagon," at the meeting of the 1st of November 1672, as one of the *Vereadores* or chief representatives of the people. But he would appear to have been subsequently punished by, or threatened with, confiscation of his lands (i).

If confiscated, they appear to have been subsequently restored, either to himself or his heirs, as amongst the unpublished papers in the appendix to Mr. Warden's Report was a warrant of attorney, executed at Bassein on the 17th of May 1731, by Martinho de Silveira deMenezes (on behalf of himself and his son Joaõ Vicente), and also by his wife Donna Mariana de Noronha, to Wissia Senoy Telung (a Brahmin), to sell the village of Mazagon and its appurtenances for 21,500 xeraphins, and to execute the necessary conveyances.

In the same appendix was a copy of a deed of sale, bearing date the 3rd of August 1731, by which Wissia Senoy Telung, with the consent of the Governor of Bombay, sold and conveyed the village of Mazagon for 21,500 xeraphins,

* It should, however, be mentioned that one of the seven districts, into which the island was divided, was called Bombaim. It probably formed the site of the present native town. Next to Mazagon, it in 1667 yielded the largest rent (pension) to Government. The other districts were Mahim, Parell, Vadela, Sion and Veroly (Worlee). Warden, para. 19 (p. 7 of the printed ed.).

(i) 3 Bruce's Annals 104; Warden para. 52, (p. 16, printed ed.); and despatch dated 18th December 1675 from the President in Council of the Surat Factory to the Deputy Governor and Council of Bombay : Surat Factory Outward Letter Book 2, 1675, 1676.

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to Antonio de Silva and Antonio de Limas, with all its appurtenances and services, new and ancient, with the two houses of lordship, one ruined and the other standing, and the administration perpetual and general of the church of Nossa Senhora de Gloria, situated in the said village, and of the patrimonial estate thereof, "to the end that they, by themselves and by their heirs and successors, attorneys and executors, may possess, enjoy, and disfuit the said Village," &c., on condition, however, of their paying the annual pensions of the said church &c., according to the Will of Senhor Christovaõ de Souza, a former quit-rent tenant of the said village, and administrator of the said church. The title of Martinho de Silveira de Menezes was stated in the deed to be "by the nomination made of the said Villages &c. to him by the Donna Senhorinha de Souza, his grandmother, deceased, by reason of its appertaining to him as the eldest and most immediate descendant of Senhor Lionel, the first quit-rent tenant (Foreiro) and possessor of the said Village." That deed was registered at the Government Secretariat.

The objection resting on the supposed unsuitability of the English rule of descent of freehold estate to a community chiefly commercial, is to a great extent neutralised by the well settled rule of English equity, that where real estate is purchased *with partnership capital*, for the *purposes of partnership trade*, it will, in the absence of any express agreement, be considered as absolutely converted into personalty; and upon the death of one of the partners, his share will not go to his heir at law, or be liable to dower, but will belong to his personal representatives: *Townsend v. Devaynes*, *Selkrig v. Davies*, *Philips v. Philips*, and the other cases collected in the note to *Lake v. Craddock*, 1 *White and Tudor*, p. 130, 1st edition.

In one of the unpublished appendices to Mr. Warden's Report, he has given, but not quite in chronological order, one hundred and twenty-nine specimens of memorials, *i.e.*, summary abstracts of conveyances, registered in the Secretariat from 1715 to 1802. Four of the deeds so registered are stated to have been respectively dated in 1697, 1705,

1709, and 1711, and the others as bearing dates varying from 1715 to 1802. The specimens given by Mr. Warden are apparently limited to memorials of conveyances by private owners of houses and lands situated in or immediately around the Fort, and of lands given by Government in other parts of the island, in exchange for ground taken from private owners as a site for the Fort walls (generally described as the town walls), or as a glacis (esplanade), made to the extent of three hundred yards, in front of those walls. There are, amongst those memorials, one of a sale by the executor, and another of a sale by the administratrix, of Muhammadans, in 1798 and 1800 respectively, two of sales by the administrators and one by the administratrix of Hindús, in 1748, 1773, and 1800 respectively, and some sales by widows of Pársis, Hindús, or Muhammadans, in which the heirs sometimes joined; but although there are, amongst the memorials, several instances of sales by British subjects to British subjects or to other vendees, there is not one in which the vendor appears to have been an executor or administrator of a British subject. There are two sales by order of Council, but whether on the decease of the owner or by way of execution* does not appear. The Governor and Council, as mortgagees, sell in one other case.

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Many of the memorials, especially those of comparatively recent date, are so uniformly meagre, as to render it next to impossible to determine from them what were the forms of the conveyances. A large proportion simply state the names of the vendor and purchaser, the parcels and boundaries, the price, and sometimes that the sale is subject to "quit" or "ground rent," or "pension," or "pension and tax." I infer from the memorials that several of the conveyances were deeds of bargain and sale. Some memorials show that the conveyance was to the grantor and his heirs, some to him, his heirs and assigns, and some few to him, his heirs, executors, administrators, and assigns. In only one does the interest conveyed appear to have been of a terminable

* At the time of those sales the Governor and Council were the principal Court of Justice in the island.

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nature. It was a lease, dated 18th April 1716, by the Governor in Council to William Mathias, mariner, "his heirs and assigns" (*sic*), of a piece of ground and dwelling house for thirty-one years, with power for him, his executors, administrators, and assigns, at any time before the expiration of fifteen years, to renew the lease on payment of a year's rent. A memorial, dated 20th August 1717, shows that "William Gyfford of Bombay, merchant, sold to Blackett Midford of Bombay, * merchant, for the sum of Rs. 2,500, current money of Bombay, all that messuage or tenement and ground, *freehold estate of inheritance*, in the tenure and occupation of the said William Gyfford, situate on the green of Bombay, having for boundaries, Eastward the new bunder, Westward the Hon'ble Company's garden, and Southward the adjoining dwelling house of Mr. Douglas Burniston, together with all yards, outhouses, &c." There are also four memorials of deeds made by way of feoffment. Of those, three appear to have been executed on behalf of the East India Company, for the purpose of carrying out exchanges of land when the Company was taking over land for the town walls, fortifications, and esplanade from the proprietors, and giving them in lieu thereof land belonging to the Company in other parts of the island. From the memorials the feoffments would seem to have been made by the Vereadores (j) of Bombay, under the authority and order of the Governor in Council. In one, dated 27th September 1720, the Vereadores are represented as having, "in the usual legal manner, enfeoffed the said Govindjee Ragoojee (the feoffee) of said oarts Razaury," &c., "which he accepted of, at same time desisting from his right over said oarts Garwarry, &c., in favour of the Hon'ble Company, who were in same manner duly enfeoffed of the same, which they accepted of

* Mr. Midford became a Member of Council.

(j) Mr. E. Menesse, the Portuguese interpreter to the Court, says: "Vereador is one who holds the staff or wand of power; is a member of Council or of the Chamber; a functionary charged with the administration of the police, or the repairs of public roads; a bazaar superintendent; a magistrate, or a public functionary who fixes local tariffs or taxes." The Vereadores assisted in collecting the pension fixed by Aungier's Convention; also in mustering and officering the island militia, and subsequently in collecting the tax substituted in 1718 for military service.

in exchange for said two oarts Razaury, &c., so given to said Ragoojee, as per deed of exchange, dated 27th September 1720." What were the ceremonies usually accompanying feoffment at that time in Bombay appear in another case, which I shall mention. "In like manner" the Collector is stated to have made grants of land, by way of exchange for land wanting for the town walls on the 15th of October 1742, in sixteen other instances. It is not actually stated that the grantees were enfeoffed with the usual ceremonies, but the clear inference is that they were so. In a memorial of a deed, dated 20th September 1720, the Vereadores, under like authority, are represented as having given certain oarts and batty ground to Pascoal Barretto and Antonio de Souza, "and satisfied them in and enfeoffed them the said oarts and batty ground by performing the usual ceremonies," &c.

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The third, dated 15th October 1745, states that "Mr. Richard Sanders, Collector of the rents and revenues of the Hon'ble Company, in conjunction with Diego Ribeiro, Vereador de Var, and the other Vereadores of Bombay, his assistants," by like authority, gave to Balcrustna Bhat an oart in lieu of another, "and satisfied the said Balcrustna Bhat in duly enfeoffing him of the said oart, by performing the usual ceremonies of putting earth, straw, and a green branch in his hand in taking of legal possession." Hence it appears that the ceremonies then usually accompanying an enfeoffment in Bombay amounted to a perfect livery of scisin. The only other exchange of land, for the purpose of obtaining a site for the town walls and space for the glacis, *stated* to have been carried out by the intervention of the Vereadores, was on the 27th of September 1720. It is not mentioned whether the usual ceremonies of enfeoffment were resorted to, but the probability is that they were, as we have seen that the Vereadores did resort to those ceremonies on the same day in a like case. Beside those already mentioned, there were sixteen other cases of like exchange for the same purpose, one of them dated 5th December 1743; the others are of uncertain date, but it seems probable that they were made in 1720, 1742, or 1743; and although the memorials

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are silent as to the intervention in those cases of the Vereadores, and as to the ceremonies observed, the strong probability is that the Vereadores were employed in carrying out the exchanges, and that the usual deeds of enfeoffment were made and livery of seisin given.

The fourth was a private sale. The memorial refers to the deed of sale as dated "Mahim, 25th July 1738," and chiefly consists of a description of the parcels. I infer, however, that the deed of sale was a feoffment, from the commencement of the memorial, which runs thus: "Amador de Cruz sold unto Bhicco Sinoy Newracur, being on account of Manoel Barreto, who at the time of enfeoffment declared the purchase to be on account of his Aunt Catharina Rodriguez, Widow of Pascoal Barreto," &c. Near the end of the memorial, after mention of payment of the consideration, it states that Catharina Rodriguez "is hereby acknowledged lawful proprietrix" of the premises.

During fourteen years' experience in this island in the Supreme Court and this Court, partly at the bar and partly on the bench, I have occasionally met with conveyances in the Portuguese language, seldom less than from eighty to one hundred years old, and have found that the most ordinary English conveyances, of dates ranging from the middle of the eighteenth century down to the passing of Act IX. of 1842, which are seen here, are in the form of a bargain and sale under seal, whereby the property conveyed is so to the grantee and "his heirs," or to him, "his heirs and assigns," or more frequently to him, "his heirs, executors, administrators, and assigns." The observation, already quoted, of *Chambers*, J., that in Calcutta the Statute of Enrolments does not apply, is good also as to Bombay; therefore, where the estate conveyed is perpetual, a freehold would pass. I have met with deeds of bargain and sale here in hundreds. Such conveyances, when not prepared by professional men, are often very incorrect, but even then generally show some adherence to the vocabulary of the law, and are doubtless imitations by Purvoes, and other Native writers, from some English prototype. Although English lawyers did not in the earlier days of

our possession of this island abound in it, yet one or two generally have in those days been here. Even so far back as the year 1675, we find that at the trial of Captain Shaxton before "a select Court of Judicature, for abetting mutinous conduct of his soldiers," a person whom Anderson describes as "a pompous attorney" was, according to Fryer, "ordered to impeach" Shaxton, and accordingly, "with some borrowed rhetorick, endeavoured to make him appear a second Catiline" (*k*). No doubt a very large proportion of the muniments of title are in the Gujarati or Marathi languages; and neither in the case of such documents nor of English conveyances does this court, nor did the Recorder's or the Supreme Court, insist upon technical precision. The intention of the parties is what is looked to. It is, as Sir E. Perry, C.J., observed (*l*), the duty of the Court to put a construction upon such documents as are brought before it.

A recovery with double vouchers suffered in the Supreme Court, the proceedings in which commenced on the 10th of February 1842, and terminated by judgment on the 25th of June 1842, appears not to have been brought to the notice of Sir E. Perry. John de Faria, a Portuguese, was the demandant, Francis John Lugrin the tenant to the præcipe, and the attorney on record was Acton Smee Ayrton. The disseisor was Hugh Hunt, and the vouchees were Joseph Maria de Ga and Manoel Murzello. The property consisted of seven oarts and several other pieces of land, situated in Girgaum, two messuages, dwelling-houses and a church, also situated in Girgaum.

Sir Alexander Anstruther appears to have stated that in two instances, the division of immoveable property amongst the children of an English subject had been contested, but he does not state in what court in Bombay, or when, the contest took place, or under what circumstances, or by whom, the cases were decided; and, for aught that appears in his statement, they may have been compromised. As regards British subjects the point can seldom have arisen. Until Act IV. of 1837 they were incapacitated from holding

(*k*) Anderson 220; Fryer, Letter III., chap. iv.

(*l*) *Doe d. Mackenzie v. Pestonjee*, Or. Ca. 534.

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in perpetuity lands in the Mofussil of this Presidency without the permission of Government, which permission it was considered impolitic to concede. In the island of Bombay, Europeans generally rent their houses from Native proprietors, and rarely acquire a permanent interest either in lands and houses ; those who have done so, sensible that they are only temporary sojourners in India, in almost all cases, on quitting it, convert their lands and houses into money. Those who are engaged in commerce generally have partners, and the rule already noticed as to real estate purchased with partnership capital for partnership purposes, would exclude any question as to the enforcement of the British law of descent of real property in such cases. However, we were astonished to find that Mr. Justice Hore had stated that all immoveable property in the island of Bombay is of the nature of chattels real, and that the law as laid down by Sir Alexander Anstruther had prevailed in Bombay for the last forty or fifty years at least.

The proposition that there was no real estate in Bombay is inconsistent with what in 1854, on my first coming to this country, I gathered to be the opinion of the Judges of the Supreme Court and the profession ; and although I have heard the judgment of Sir A. Anstruther in *Doe d. De Silveira v. Texeira* occasionally alluded to, it has been always denied to be sound doctrine so far as it referred to any other persons than Portuguese. As to its validity with regard to the alleged rule of succession amongst Portuguese, or what has been the opinion of the bench or the legal profession on that subject, I say nothing at present.

We are at a loss to understand how the learned Judge whose decision is now under appeal, could have arrived at the conclusion that Sir A. Anstruther's doctrine as to the non-existence of real estate has ever prevailed in the Supreme Court, and have been unable to discover that it has been in even a solitary instance adopted. Mr. Justice Hore has not specified any such instance. The learned Judge has claimed for himself a greater experience than that of any other person now in Bombay, and therefore renders it necessary that we

should point out that the experience of which he speaks was not in the Supreme Court. The two periods during which the learned Judge was a practitioner in that court extended, on each occasion, over a few months, and during the interval between them he practised at the Calcutta bar. His appointment to the office of Administrator General removed him from practice in Bombay from the 1st of April 1853, and since the middle of 1855 he has been the Chief Judge of the Court of Small Causes. The absence of Reports may have prevented him from being fully aware of the opinions of the Supreme Court. With the exception of Sir Erskine Perry's interesting and useful collection, some cases in which Mr. Morley previously published in the 2nd volume of his Digest, there has been a total absence of Reports of the decisions and dicta of the Judges of the Supreme Court. Sir Erskine Perry's Reports contain no case in which the existence of freehold estate of inheritance in Bombay was actually contested. Nevertheless, they furnish matter which shows that he was not under the same impression on that subject as the learned Judge, who has quoted a passage from *Doe d. McKenzie v. Pestonjee* (*m*) to support his position, that immoveable estate has always been considered to have been of the nature of personal estate, but has failed to perceive that in that very case Sir Erskine Perry held that the Pársi grantees, under the documents bearing date in the years 1783 and 1795, took a complete estate in fee in the lands thereby granted; the contest of the unsuccessful party there being, that the estate created was merely an estate tail, leaving a reversion in the Crown. Sir E. Perry's observations in *Hough v. Leckie* (*n*) show very clearly that, in the case of a grant of land in perpetuity by Government, he would have held, in accordance with *Freeman v. Fairlie*, that a freehold would pass. The whole of the contest in *Hough v. Leckie* was unnecessary if the law relating to real estate had no place in Bombay. Neither of the learned counsel in that case ventured to assert that, if a perpetual interest had been created by the instrument there under consideration, the doctrine

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(*m*) Perry's Or. Cases 534.

(*n*) *Ibid.* 496.

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of *Freeman v. Fairlie* would not have been properly applicable to it. Those counsel were two of the most eminent practitioners of their day at the Bombay bar, the late Mr. William Howard, and Mr. Sebastian Dickenson. The instrument in question, a letter from the Collector of Bombay (dated 14th February 1806), was held to amount to a lease for nine years from Government. It had expired many years before the institution of the suit. The tenant had died before the expiration of the lease. His devisee for life continued in possession, and on her death her daughter took possession, and paid the original rent to Government. The tenancy was, in 1848, held by Sir Erskine Perry to have become a tenancy from year to year.

The observation of Mr. Justice Hore, that it must be borne in mind that Act IX. of 1837 "was passed with reference to the property of Parsis situate in all the Presidency Towns, and not in the town of Bombay only," and "by a Legislature whose deliberations were conducted in a town where the English law of real property prevailed," is not, in our opinion, of any force.

The Pársis of India are inhabitants of Bombay, Surat, and Nausári; of these the vast majority dwell in Bombay. A few may be sprinkled throughout Calcutta, Madras, and other parts of India, but the number is so small as to be of no importance. The petition from the Pársis, praying legislative relief, was presented to the Bombay Government in March 1836. It complained, *inter alia*, that in the charters of the Recorder's and Supreme Courts no such exceptions had been made in favour of Pársis as had been made in these charters in favour of Gentúis and Muhammadans, and, in substance, stated that theretofore Pársis had been in the habit of making wills, and that such wills, although not duly attested according to English law, had been recognised; and that, in cases of intestacy, Pársis had divided the property, immoveable and moveable, of the intestate amongst the widow and children, "according to certain usages which have prevailed amongst the most wealthy and respectable families, and in some instances corresponding with the mode of distribution

or division which has obtained amongst Hindús in this part of India." They added: "These usages have been so long submitted to, and have been followed in so many instances from generation to generation, that they have by many persons been considered to have the force of law." Thus it will be seen that they did not put forward any fixed or universal rule of distribution or succession, and they wholly omitted to mention the proportions in which distribution, when made, was made, except in those cases in which they say resort was had to the Hindú rule. Speaking of the omission in the charters of the Recorder's and the Supremo Courts to make an exception in favour of Pársis, they say: "The inconvenience, however, was not felt while Pársis agreed among themselves, and kept themselves and their family disputes and differences from being taken into the Recorder's and Supreme Courts;" and then the petitioners mention the institution of suits in the Supreme Court, in which the English rules of descent, and as to the attestation of wills of real property, were sought to be applied to Pársis; and praying a legislative remedy, they suggested that an Act should be passed confirming all partitions of landed property "where no fraud prevailed," and declaring that persons in possession for twenty-five years under any will, partition, or other family arrangement, or arbitration, or award, should not be disturbed. They suggest that the Judges of the Supreme Court should be consulted in the matter. Whether that was done I have been unable to discover. But the Bombay Government lost no time in laying the petition before Mr. Roper, then Acting Advocate General, and of great professional experience in Bombay. He, after examining the authorities on Pársi usages, which he found very indefinite and inconclusive, said that it would be difficult to assert that there was "any system of law peculiar to Pársis," and advised Government that "even if such a peculiar custom did exist and could be ascertained, the Supreme Courts were not empowered to administer it, and that he always understood that Pársis at Bombay were, strictly speaking, subject to the English law." He also, in a subsequent part of his opinion, said "According to my experience, Pársis have hitherto made

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no distinction between immoveable or landed and moveable property. They have treated all such property as chattels, distributing it, where the owner died intestate, amongst the next of kin, to the exclusion, however, of female kindred, wherever such exclusion could be effected. In legislating with respect to Pársis, the rights of the female members of that community might be established or declared. I am not aware of any instance in which lands or immoveable property have been held to be real estate in the hands of a Pársi; or in which the eldest son of a Pársi has been held entitled, as heir, to lands or immoveable property; or in which the will of a Pársi has been held insufficient to pass lands or houses, because such will had not been made as a will of real property is required to be made in England. Such questions and others, in like manner important to Pársis, are evaded by the Court. *Either the cases in which those points arise are decided upon other grounds, independent of such points, or the parties are importuned to refer their differences to arbitration.* They submit to such references with reluctance; not that they are now more litigious than formerly, but their Pancháyat, I believe, is not in very high repute amongst them, and if parties can obtain the judgment of a court on their disputes, they frequently prefer such judgment to the decision of private arbitrators. The better remedy for the petitioners, I think, would be an Act declaring the law which is to be considered as having been hitherto applicable to Pársis, and providing that such law shall in future apply to them. The sort of statute of limitations suggested by the petitioners would perhaps prove a very insufficient expedient; and as they intend such Act should apply only where no fraud has been practised by the parties to a transaction, I imagine the operation of the proposed statute would be very limited indeed."

The Bombay Government, on the 6th of June 1836, forwarded the petition and Mr. Roper's opinion to the Government of India, and supported the prayer of the petition. The Government of India, on the 4th of July 1836, laid those documents before the Indian Law Commission. The draft

of the Act prepared by the Commissioners, *verbatim* as the Act now stands, was transmitted, in January 1837, by the Government of India to that of Bombay, and by the latter published in the Gazette of that Government, which Government also laid a copy of the draft before the petitioners, requesting the opinion of the Pársi community upon it. The petitioners, by letter of the 6th of April 1837, replied to the Bombay Government, that "the proposed enactment entirely and most completely meets the views and wishes of the Pársi community, and they have no objections whatever to urge against it."

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Had the doctrine of Sir A. Anstruther been law, and had freeholds of inheritance and the law of real property no place in Bombay, Sir Henry Roper would not have advised Government that there was any necessity, by legislation, to exclude the application of the English rules of inheritance to immoveable estate of Pársis, nor would the Commissioners have permitted the Legislature to cumber the Statute Book of India with an unnecessary Act.

That Act has no operation in rendering immoveable property of the nature of chattels real, save "so far as regards the transmission of such property on the death and intestacy of any Pársi having a beneficial interest in the same, or by the last will of any such Pársi."

In a case some six or seven years ago before our late Chief Justice, Sir M. SAUSSE, in which Mr. White was counsel on one side and I was counsel upon the other, I contended that where the lands, in this island, of a Pársi who died intestate before the 1st of June 1837, appeared to have continued after his death in the possession of the eldest of several sons of the intestate, they must be taken to have descended upon him by the English rule of primogeniture. The cause was allowed to stand over until next day, in order to permit my learned friend Mr. White to consider the point, which he did, and on that day contended, with his wonted vigour, that the property must be taken to have been chattel real, and to have been divisible amongst the next of kin; and he

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relied strongly on the words "to have been" in the first section of Act IX. of 1837; but the Chief Justice, referring to the words "from the 1st day of June 1837" in that section, and to the second section *passim*, ruled in my favour, and said he never had any doubt upon the matter. On one occasion, at least, in the Recorder's Court of Bombay, the law appears to have been administered to Pársis on the same principles as in the Mofussil. That was the case of the "*Gheestas*," in which Sir James Mackintosh, just before leaving India (in 1811), was induced, on evidence that such was Pársi usage, to admit to the right of inheritance the illegitimate son of an intestate Pársi, because he had been invested with the sacred badge. This decision, which caused a great sensation among the Pársi community at the time, was reversed by Sir John Newbold (Sir James Mackintosh's immediate acting successor) (o).

If the 5th section of the Statute of Frauds, requiring at least three witnesses to a will of real estate, had no application in Bombay before the passing of Act XXV. of 1838, (the Wills Act); if *Gardiner v. Fell* were no authority here, and there were no real estate in Bombay, the toilsome inquiry as to the practice relating to the wills of Hindús affecting immoveable property, directed by Sir M. *Sausse*, C.J., and Sir J. *Arnould*, J., in 1863, in *Muncherjee Pestonjee v. Narayen Luxamoujee* (p), was quite superfluous.

In the cause of *Pedro Laurence de Monte v. Hussein Bibi*, the plaintiff was a younger son of Manoel de Monte, who died on the 15th of September 1844, leaving immoveable property (a house in which he had an estate in perpetuity) situated in Girgaum, in this island. Manoel de Monte left surviving him his eldest son, John de Monte, who died in 1847, leaving two sons, Francis and Felix, and a daughter and widow. In 1847, after the death of John de Monte, the plaintiff proved the will of his father, Manoel de Monte. Subsequently Francis de Monte died, leaving his brother Felix surviving him, and he was alive at the trial of the suit

(o) Pársi Law Commission Report, pp. 1 and 2.
(p) 1 Bom. H. C. Rep. 77.

which was brought in 1863 by the plaintiff, as executor of Manoel de Monte, to recover possession of the house from the defendant. By his will, Manoel de Monte directed his executor to sell the house, but did not devise the house to him for that purpose. On the hearing before our brother Arnould, Mr. Dunbar, for the defendant, objected that the plaintiff, not being heir at law, and being executor only, could not maintain ejectment, the will containing no devise to him, and nothing but a bare power to sell, and he cited *Doe d. Hampton v. Shotter* (q), 1 Sugden on Powers 229, 6th edn. 1 Wms. on Executors, p. 549, 4th edn. After hearing Mr. Scoble on behalf of the plaintiff, our brother Arnould, on the 7th of September 1863, dismissed the suit with costs, "on the ground that there was no devise of the house in the will, but merely a power, coupled with a direction to sell." That is in effect a clear decision that the property was real, and not personal.

Sedgwick v. Colley and others was a suit instituted at the Equity side of the Supreme Court in 1862, and arose upon the Will of General Browrigg, made in 1808, which was penned in language both informal and involved. Subject to certain annuities, he devised his immoveable property, of considerable value, situated within the Fort walls of Bombay, in which he had an estate in perpetuity, upon trust (subject to certain annuities) to Thomas Smith in tail, with remainder over to the plaintiff, as she contended, in tail, but, as the heir at law of the testator contended, for life only, if the devise to her were not altogether void for remoteness. Thomas Smith, in 1838, executed a disentailing deed, under Stat. 3 & 4 Wm. IV., c. 74 (Fines and Recoveries Eng. Act), and enrolled it in England and Ireland. He, by his will, devised the property to trustees in trust for the defendant, Colley, for life, remainder over. Subsequently to the death of Thomas Smith without issue, the plaintiff, on the 4th of November 1857, executed a disentailing deed of the same property, under the Indian Act XXXI. of 1854. The plaintiff filed her bill for a declaration of her rights. The defendant,

(q) 8 Ad. and E. 905.

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Colley, by his answer, alleged that whether the property were regarded as real or personal estate, Smith had power to devise it; if real, because, as tenant in tail under the General's Will, he had, by the disentailing Deed of 1838, acquired the fee; and if personal, because the devise in the Will in that case gave to Smith an absolute interest. Sir M. *Sausse*, C.J., at the hearing of the cause in 1866, speaking of Colley's attempt in his answer to uphold the disentailing Deed of 1838, on the ground that Bombay was holden by the East India Company as of the manor of East Greenwich, said: "It is the first time that such a proposition has been advanced in Bombay. It appears to be quite untenable, and was properly abandoned at the bar by counsel for the devisee (Colley), as not capable of being supported. If Bombay were held to be an integral part of East Greenwich, any statute passed in England and having operation in East Greenwich should be in force in Bombay. That point, however, having been abandoned, I do not further refer to it." The Chief Justice by his decree, declared the plaintiff, under the Will of General Brownrigg and in the events which had happened, entitled to the *fee and inheritance* in possession of his immoveable property in Bombay, from the death of Thomas Smith, in 1856, and ordered Colley to pay to the plaintiff her costs of the suit. That decree now stands for rehearing on the petition of the defendant, Giles Brownrigg, the heir at law of General Brownrigg, but he of course, as well as his adversary, the plaintiff, maintains that the property is real estate. Colley has made no attempt to disturb the decree.

We find nothing in Act XXIX. of 1839 for the amendment of the law of Dower, or in Act XXX. of 1839 for the amendment of the law of Inheritance, or in Act XXXI. of 1854 for the abolition of real actions and fines and recoveries, which exclude their operation in Bombay. In *Sedgwick v. Colley* the application of the last of those Acts to Bombay was not denied on behalf of any of the parties in the cause at the hearing, and it is manifest that the clauses relating

to the acknowledgment of Deeds by married women applied to all of Her Majesty's Courts in India.

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That most, though not all, of the lands in Bombay are held in perpetuity, will be seen by reference to Governor Aungier's Convention in 1672, Mr. Warden's Report in 1814, and No. III. of the New Series of the Bombay Government Records, containing, amongst other papers, Mr. Le Messurier's Report of the 23rd of December 1843 on the Foras Lands (*r*), and Act VI. of 1851. The preamble of that Act, it is important to observe, recited that the East India Company were then "legally entitled to the *freehold reversion*" of certain foras lands, the outline of which was delineated in a plan mentioned in the Act. The second section, reserving a part of those lands required for public purposes, extinguished the "rights of the Company" in the residue of them, *in favour of the tenants*, who were the immediate rent-payers to the Company, saving the rent and "all rights of forfeiture and escheat in respect of want of heirs or representatives, or of felonies committed, or otherwise in respect of attainer." Supposing the freehold reversion to have been vested in the East India Company, as recited (*s*), Act VI. of 1851 would appear to have vested it in the tenants (*t*). To estates *in which the possessors had a permanent interest*, we find that all of the three schools which we have mentioned, have applied, when the possessors are British subjects, the English law of inheritance. The Com-

(*r*) Salt batty grounds reclaimed from the sea, chiefly, but not wholly, by the building of the causeway or vellard near Breach Candy in 1776-1780, during the time of Governor Hornby. A good account of the condition of the island of Bombay at the time of the cession to the English will be found in Fryer, Letter II., chap. I., pp. 66, 67. There were reclamations on a small scale before 1776 of what the Court of Directors were wont to term in their despatches "the drowned lands."

(*s*) If the opinion of Mr. Advocate General Macklin, mentioned in Mr. Le Messurier's Report, and the opinion of Mr. Le Messurier, were correct, the recital was not true, and the reversion, instead of being in the Company, was in the tenants, and the Company was, according to *Doe d. Whitlick v. Johnson*, Gow's N. P. Rep. 173, cited by Mr. Le Messurier, entitled to the foras (or quit) rent only, and not to the land.

(*t*) As to waste lands, see *Doe d. E. I. Company v. Hirabai*, Perry's Oriental Cases 480.

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missioners, including Mr. Amos, admitted that such was the rule within the Presidency Towns (*u*), and that, to render the rule otherwise in the Mofussil, legislation was necessary. Master Stephen and Lord Lyndhurst, whose opinions in a great measure coincide with those in the *Lex Loci* Report as to the modified introduction of English Law, held that the English canon of descent must prevail amongst British subjects as to land in Calcutta. The Judges of the Supreme Court at Calcutta have been, with one exception, unanimous on the point, and the Mofussil courts, by a different road, arrive at the same result as to lands in the Mofussil. We see no reason for adopting an opposite doctrine in Bombay, whether we look to the Treaty of 1661; the original charter of 1668 to the East India Company, conferring a fee upon that Company, and conversant of hereditaments; Aungier's Convention, which nominates the estates, with which it deals, estates of inheritance—an ancient and remarkable specimen of which was the manor of Mazagon; or to the other charters, including the Mayor's Court, the Recorder's Court, and the Supreme Court Charters. The two latter expressly take the distinction between real and personal estate: "all pleas and actions," mentioned in the charters of the Mayor's Court, are sufficient to comprise real actions, and the Supreme Court of Bombay is by statute expressly enjoined to exercise all the jurisdictions and powers of the Supreme Court at Calcutta, which is, in words, empowered to try real actions. The conveyances and Bombay authorities referred to, the statute of Geo. IV., and the Indian Acts IX. of 1837, VI. of 1851, and XXXI. of 1854, admit of no other conclusion than that, at the time the judgment under appeal in this case was given, there were, in Bombay, freehold estates of inheritance, in the English acceptation of the term.

(*u*) See, however, as to special legislation for Madras, which would preclude or limit the operation of the rule there, the observations of Sir A. Anstruther, 2 Morley's Dig. 271.

The judgment of Mr. Justice HORE in the Division Court, and against which the above appeal was made (after briefly stating the facts of the case), proceeded as follows:—

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Now the contract which the plaintiffs ask the court to compel the defendant specifically to perform, is to be collected from these three letters (*v*), and the lease to which those letters refer; and the questions which I have to decide are whether there is evidence of a contract to grant a further lease, and, if so, whether the defendant can, and ought to be compelled to perform it.

The defence set up was, first, that there is no contract, or memorandum of a contract, in writing sufficient to satisfy the 4th section of the Statute of Frauds; and secondly, if there is, that the defendant is unable to fulfil his contract, on account of the mortgagee, Hirjibhái Hormasji, and the defendant's wife, A'máye, refusing to concur in granting a further lease.

Upon the first point, it appears to me that the three letters, taken in connection with the expired lease, form as complete a contract as can possibly be constituted by means of unconnected documents, or by documents unconnected except so far as they refer to each other; and it is well settled that contracts thus constituted are sufficient to satisfy the Statute of Frauds. The three letters refer to each other; they refer to the property as already held under lease, and as occupied by the plaintiffs; they mention the period for which they are to be let, and the time from which the renewed tenancy is to commence; they refer to the rent, and conditions mentioned and contained in the former lease, as the rent and conditions to be paid and observed under the extended tenancy; and it is clear that parol evidence is admissible to show what the lease referred to is, in order, by connecting the letters and lease together, to constitute one entire contract in writing, and thus satisfy the requirements of the Statute of Frauds: *Ridgway v. Wharton* (*w*). The docu-

(*v*) Printed *suprà*, pp. 3, 4.

(*w*) 4 Jur. N. S. II. L., 173.

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ments, in fact, describe most fully all the terms upon which the property to be let is intended to be held; and the only discussion upon them was with reference to the persons to whom the renewed lease was to be granted, whether to all the plaintiffs or to the plaintiff Henry Rogers alone. But when we look to the letter of the 8th of March, addressed to the defendant by the plaintiffs (Rogers & Co.), in which particular mention is made of "our Mr. Rogers," and in which it is stated that "we agree" to do so and so, and that "we would be glad if you would confirm the terms in writing," and then find the defendant, in his answer of the 22nd of April, saying "I agree to the terms you propose," there can I think, be little or no doubt that the defendant did intend and agree to grant the lease to all the plaintiffs, and not to the plaintiff Henry Rogers only. The question, however, is of very little moment, as the plaintiffs, in their plaint, offer to accept the lease either in their own names, or in the name of Henry Rogers alone. I am of opinion, therefore, that the defendant did enter into a contract in writing sufficient to satisfy the Statute of Frauds.

Is he, then, able, and if so, ought he to be compelled, to fulfil the contract which he has thus entered into? A considerable part of the argument on both sides was addressed to the two questions: first, what was the legal position of the defendant after the execution of the mortgage to Hirjibhai, whether he was tenant at sufferance, or in what capacity he stood with reference to him as mortgagee; and, secondly, whether the property was re-demised to the defendant and his wife, by the indenture of mortgage of the 14th of February 1859. I must confess that I was unable at the hearing, and still am unable, to appreciate the force and weight of these arguments. For with reference to the first, whatever he may be called, or whatever estate-holder he may be assimilated to (and I consider that he strictly represents the character neither of a tenant at will nor of a tenant at sufferance), the rights, powers, and liabilities of a mortgagor in possession are now well ascertained and settled by authority; and it is clear that where a person in actual possession of land mort-

gages it, and subsequently demises it at a rent, although the demise is absolutely void against the mortgagee, it is nevertheless good as between the mortgagor and his tenant, until the mortgagee interferes: until eviction, either actual or constructive, by the mortgagee, the mortgagor is entitled to recover the rent for his own absolute use, and to distrain for it in his own name, if not paid when due: *Wheeler v. Branscombe* (x), *Trent v. Hunt* (y); and as to the re-demise, had any been created, it could only have extended, under the clause in the mortgage-deed, down to the 14th day of February 1862; and if the defendant's power to grant an extended lease was acquired under such re-demise, that power ceased long before the termination of the old lease, and, therefore, could not have availed or enabled the defendant to grant the lease in question. But in reality the mortgage created no re-demise, for to constitute a re-demise, not only must the time during which the mortgagor is to hold be terminable and certain (which was the case here), but there must be (what was wanting here) an affirmative covenant or agreement that the mortgagor shall hold for a determinate period: *Doe d. Roylance v. Lightfoot* (z), *Doe d. Parsley v. Day* (a). In the mortgage before the court, the covenant by Hirjibhái Hormasji, that he would not call in or compel payment of the principal money, or of the rents and profits, until the 14th day of February 1862, is a negative covenant merely, and does not amount to a lease or re-demise.

The question still remains, does the refusal of the defendant's wife and of Hirjibhái Hormasji, or of either of them, prevent the defendant's fulfilling his contract, or ought such refusal to deter the Court from enforcing its performance? On this part of the case it was contended for the plaintiffs: 1st, that the property in question is chattels real or personal property, and having been conveyed to Náoroji Berámji and Aímáye his wife, that it vested in the former absolutely and solely; 2ndly, that if the property is to be regarded as freehold of inheritance or real estate,

(x) 5 Q.B. 373.

(y) 9 Exch. 14.

(z) 8 M. and W. 564. (a) 2 Q. B. 147; 1 Smith L. C. 446, 4th ed.

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the conveyance to Náoreji Berámji and A'ímáye his wife made them tenants by entireties, and that the former has consequently the power, independently of his wife, to grant a lease for five years, provided he and his wife so long live, the plaintiffs being willing to accept the lease so conditionally limited; and 3rdly, that the non-concurrence of Hirjbhái Hormasji is immaterial, inasmuch as the plaintiffs are willing, and by their plaint offer, to redeem his mortgage.

The first part of this argument raises the very important question, What is the nature of landed or immoveable property in the island of Bombay? Had that question been one "of first impression," one that has hitherto remained undecided by any court of competent jurisdiction, I should certainly have been very reluctant to express any opinion of my own on the subject, without first hearing a much more comprehensive and exhaustive argument than that I was favoured with at the trial of this suit. As it is, the question was settled nearly half a century ago, by the very able and elaborate judgment of Sir Alexander Anstruther, the then Recorder of Bombay; and I am not aware of any subsequent case in which the correctness of that decision has in any measure been impeached or questioned. Not only do I consider myself bound by that judgment, but I entirely approve of that part of it which confines itself strictly to the nature of immoveable property, considering that portion, at least, to be based on good reasoning and sound principles. The case to which I refer is *Doe d. Antonia de Silveira v. S. B. Texeira* (b).

"But I also think," says the learned Judge (c), "that the claim of the plaintiff would be valid under the law of succession of English subjects here. The whole existing practice of this place is inconsistent with the title to real property being the same here as in England. From the uniformity of the practice here, I have no doubt that the course of decisions, from the earliest time, has proceeded upon the principle of the succession to all property, whether real or personal being governed by one law, the law of succession to per-

(b) 2 Mor. Dig. 247.

(c) *Ibid.*, p. 254.

sonal estate ; but it is not even confined to succession. The law of all property here is, throughout, the law of personal property, and was so long before it was apparently legalised by the Charter under which we now act as to execution. Such being the admitted fact, the only question is, whether this course of decision could have had a legal commencement. If it could be legal, we must presume it was so : it might commence by charter, or by proclamation of the king, or by regulation of the company under the legislative authority given by the king's charter. From the time of Charles the Second there appears to have been a legal judicature here, under the original sanction of the king's charters, and acting, as I presume, upon some legislative provisions which the East India Company was empowered to make from time to time. If no such legislative power had been vested in the Company, and if the power of making laws for this island had remained wholly in the Crown, I think the Court ought not to hesitate in presuming the necessary authority of the Crown to have originated and sanctioned a course now established by usage, and, as I think, highly beneficial and expedient.

"The privilege of real property, of not being taken in execution under a *fieri facias*, and of not being liable to simple contract debts of a deceased owner, is naturally so unjust, and so unfit for a colonial establishment, that it has been, I believe, universally rejected in the plantations. The general rule that the law of the mother-country is not to be carried into a colony, except so far as it is fit for the state of the colony, explains, and fully warrants, this part of the old practice of former Courts of Judicature here, or would give legality to any legislative provisions of the Company, supported by such manifest grounds of expediency. The same principle will justify the deviation from the English law as to the whole character of real property in India.

"When the Courts of Judicature were first called upon to decide upon the rights of succession ; or when the East India Company were first called upon to determine by regulation what law of succession as to lands should be followed in Bombay ; the general question may be supposed to have

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been, whether the law of freehold property in England should or should not be introduced here. And the inconveniences of such a rule, as to legal executions for debt, and as to immunity of the lands of a deceased from his simple contract debts, are so obvious, that no one can be surprised at its not being adopted. In both those points, more particularly, the English law of real property is wholly contrary to the principles of mercantile law; and commerce must be considered as the basis, as it is manifestly the principal object, of all distant plantations and colonies of a mercantile people. Bombay was obtained expressly for the purpose of English commerce. * * * *

"The only general and consistent principle which could be established here, so as to protect the usages of the natives, and also to prevent the unjust effects of the English law of real property as to debts; and which has accordingly been established in practice, from the evident reason of the thing, long before and independently of the statutes establishing the King's Courts, and appearing to sanction in part the established custom, is, that the law of property in land here cannot, consistently with the state of this society, be permitted to follow and depend upon the land, as in England; that the property in lands here must, therefore, follow the law of property of the person, or, to use a more familiar expression, that it must, like leaseholds in England, become personal property, for the purpose of succession, and of liability for debts by execution or otherwise, and in other matters of title, and must, therefore, be as variable as the laws of the various castes who compose this society."

But independently of this authority, and even if the case before the Court were *res integra*, I should myself be disposed, on general principles, to hold that immoveable property in Bombay is of the nature of chattels real, and not of the nature of freehold of inheritance.

It is a well known and indisputable rule of law, that whenever a settlement is obtained in an inhabited country, either by conquest or by cession from another power, the law of that country continues the same until the paramount power

(the Crown or Legislature) intervenes, and introduces at change. Now the island of Bombay at the time of its cession to the Crown of England was occupied, almost entirely, by Hindús, Muhammadans, and Portuguese, to whom the broad distinction that exists in England between real and personal estate was entirely unknown ; all property, according to their respective laws, descending alike, to the same persons, in a manner totally different to the descent of real property, but much more closely resembling that of personal property, in England. So unsuitable to the state, wants, and circumstances of such people would the English law of real property appear, that a governing body, like the East India Company, having power to legislate for the inhabitants of Bombay, instead of introducing such a law, would rather hasten to repeal it, if any law so objectionable was found to exist. It is an undoubted and admitted fact, that English law is the *lex loci* of Bombay, and it is also admitted that all Her Majesty's subjects here, with the exception of Hindús and Muhammadans, are amenable to that law ; but there is nothing, as far as I can discover, to lead us to the conclusion that that branch of English law which we call real property law, or any part of it, has ever been introduced into this island. On the contrary, immoveable property in Bombay, since the British rule, appears to have been all along treated in a manner wholly inconsistent with the idea of its being real estate. No single instance is known of the succession to houses or lands held by an eldest to the exclusion of younger sons. Executors and administrators, in their capacity of personal representatives, were in the habit of selling immoveable property long before such sales were legalised by any Act of the Legislature. Lands and houses were held available for the payment of simple contract debts, in the absence, and without the sanction, of any express enactment on the subject, long before they were made so liable in a Court of Equity in England. Houses and lands were also sold by the sheriff under writs of *fieri facias*, long before such sales were legalised by the king's charters. Such property, in former times, was transferred, not by feoffment, or by lease and release, but by a simple

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writing, expressive of the intention of the parties, and in later years (prior to Act XXXI. of 1854, for simplifying the modes of conveyancing) it was most generally transferred by a conveyance assuming the form of a release only, without reference to Act IX. of 1842 (for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties). It also appears from Sir Alexander Anstruther's judgment, that although the right of an eldest son to succeed to landed property as heir at law, to the exclusion of other sons, had been contested on two different occasions, the claims had failed and been disallowed.

During my own experience, which I believe to be greater than that of any other person now in Bombay, I have never heard of property here having been transferred by feoffment, nor of a fine having been levied, nor of a recovery having been suffered, nor have I once seen a conveyance by a lease and release. And Sir Erskine Perry's judgment in *Doe d. M'Kenzie v. Pestonjee Daulabhai* (*l*), in my opinion, tends most strongly to show that immoveable property has always been considered to be of the nature of personal estate. At page 534 he says, "Although English law has been introduced into this Island, to the supersession of the Portuguese feudal law, which appears to have prevailed at the period of the cession, the forms of English conveyancing have never been in use, and the oldest practitioners have never heard of a fine or recovery. Land, therefore, passes from hand to hand with all the simplicity of a transaction not fettered by forms; and all that we see in Courts of Justice on such occasions is a simple writing, not under seal, expressive of the intention of the parties." Had lands in Bombay been freehold of inheritance, it would in former times, prior to the year 1842, have been conveyed either by feoffment, or by lease and release, and latterly, in the interval between the passing of Act IX. of 1842 and Act XXXI. of 1854, by deed of release, referring to the former of those Acts; and as such assurances as feoffments and deeds of lease and release are entirely unknown to Bombay, and as

(d) Or. Ca. 531.

conveyances executed since the passing of Act IX. of 1842 very seldom refer to that Act (although they occasionally do), and as immoveable property here has been allowed to assume (as I have shown) all the characteristics of personal estate, it seems to follow, almost conclusively, that such property has always been regarded, and that it in fact is, of the nature of chattels real or personal estate.

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Freeman v. Fairlie (e), which was relied on by the defendant, appears to me to be of no authority in his favour. The same Judges who, on the evidence and circumstances before them in that case, decided that lands in Calcutta were of the nature of freeholds of inheritance, would, in my opinion, upon the evidence and under the circumstances appearing in this case, hold that lands in Bombay are of the nature of personal estate, the evidence and circumstances in the former being the very reverse of what they are in this. Lord Lyndhurst, in his judgment (f), says, "I think it beyond all doubt that property of this description has, from the period of the year 1774 (the date of the Charter of Justice), been constantly conveyed by *deeds of lease and release*, in the form in which Oldham took the property in question. It is proved also, and by one of the officers of the Court, that of land of this description *fines* are levied. It is proved by all these persons that it has been the *constant course* of the Supreme Court of Calcutta, when ejectments are brought by the heir at law, on establishing the possession and title of the ancestor, and proving the claimant is the heir at law, in such ejectments, the heir has always recovered." Lord Brougham, in the *Mayor of Lyons v. The East India Company* (g), states that the grounds of decision in *Freeman v. Fairlie* "were chiefly the practice of the settlement in regard to the mode of conveyances, viz., by lease and release, with the course of succession, and also the Charter of the Company, with the Acts of Parliament referring to them, the charter of the 13 Geo. I. being the one principally

(e) 1 Moo. Ind. App. 305. (f) *Ibid.* 344.

(g) 1 Moo. Ind. App. 282.

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cited," and at page 284 he says, "the introduction of English law is proved by showing that the mode of conveyance is adopted by lease and release, that is, upon the Statute of Uses. But in perusing the decision itself it will be found that Lord Lyndhurst rested it entirely upon the practice and decisions that had prevailed and been passed in Calcutta; and that the Charters and Acts of Parliament were referred to solely for the purpose of ascertaining whether that practice could have had a legal origin.

No circumstances in any degree similar to those referred to in *Freeman v. Fairlie* were relied on before me; and the only argument of any weight that was urged, was with reference to Act IX. of 1837, whereby it is enacted that all immoveable property within the jurisdiction of any of the Supreme Courts belonging to Pársis, as far as regards its transmission on the death of the owner, should be taken to be and to have been of the nature of chattels real, and not freehold; and it was contended on the one hand, that the immoveable property of Pársis in Bombay was by this Act made to be of the nature of chattels real for all purposes, and not for the purpose of transmission on death only, an argument which I consider to be wholly untenable; and on the other hand, that if immoveable property in Bombay was, before the passing of an Act, of the nature of chattels real, the Act itself was unnecessary and wholly inoperative so far as Bombay was concerned. It is understood that the Act was passed at the instance of certain Pársis residing in Bombay, who were apprehensive that the English law of real property was *for the first time* about to be applied, or might be applied, in a case which had lately arisen, and in which a young Pársi had preferred a claim to be entitled to certain property as heir at law, to the exclusion of the other next of kin. But it must be borne in mind that the Act was passed with reference to the property of Pársis situato in all the presidency towns, and not in the town of Bombay only; that it was passed by a Legislature whose deliberations were conducted in a town where the English law of real property prevailed; and that, although Pársis had, for

very many years prior to its promulgation, occupied and possessed, as owners, a large portion of the land in Bombay, the claim which gave rise to the Act was the first, and the only one of the kind that has come to our knowledge. But even if other and far weightier arguments could be adduced in favour of the defendant's position (and I dare say that some unknown to me may exist), none, in my opinion, ought, at this late day, to be allowed to prevail against the solemn and deliberate decision of a learned Judge, who at the time presided over the highest Court of Judicature in the Island, more especially as the law pronounced in that judgment is evidently the law which has regulated the law of succession to immoveable property in Bombay for the last forty or fifty years at least.

I quite agree with the opinion expressed by Sir Erskine Perry in *Doe d. Dorabji v. The Bishop of Bombay* (h), that it is peculiarly incumbent upon the Judges of this Court "to follow humbly the steps of their predecessors in questions which do not depend upon principles of universal jurisprudence." Even if the decision of Sir Alexander Anstruther could, for any reason, be regarded as erroneous, I should nevertheless, it has so long been acquiesced in, feel myself bound to adopt and follow it; and I doubt much whether a Court of Appeal even would feel itself justified in overruling it: see *Daly v. The India and London Life In-Company* (i), where Parke, B., says: "Though we are quite satisfied that the case of *Godsall and Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a Court of Error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it."

For these reasons I am of opinion that immoveable property in the island of Bombay is of the nature of chattels real or personal estate; and that, as the property in question was conveyed to the defendant and his wife, and as marriage,

(h) Or. Ca. 506. (i) 15 C.B. 392.

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according to English law, operates as a gift to the husband of all the wife's chattels real, the defendant is competent to let it, or to dispose of it in any way he may think fit, without the concurrence of his wife.

Secondly, assuming the property in question to be freehold of inheritance, and not chattels real, as *I have decided it to be*, as it was conveyed to the defendant and his wife A'imáye during coverture, it became vested in them as tenants by entireties. The husband being seised of the whole estate during coverture, at least, either in his own right or *jure uxoris*, can of course dispose of that entire interest: Co. Lit. 287 a; Com. Dig. Baron and Feme D. 2. But his conveyance alone would have no effect against his wife surviving. The effect of the conveyance to the two would be to place the ownership for the coverture entirely in the husband's power, so as to entitle him to alienate it at pleasure, and to pass the limited freehold or any lesser interest without the wife's coöperation: Wat. Conv. 170; Macq. Hus. and W. 27. Even supposing, then, that the property is real estate, the defendant would be able to grant it on lease for five years, provided he and his wife should so long live; and as the plaintiffs are willing to accept a lease on these conditions, I think they are entitled to demand it, provided the refusal of Hirjibhái Hormasji constitutes no bar to that right.

Thirdly, does the refusal of the mortgagee to concur in the lease, present an obstacle in the way of the fulfilment of the contract by the defendant, or justify him in refusing to fulfil it? In my opinion it does not. All that Hirjibhái Hormasji, as mortgagee, is entitled to, is the payment of his principal and interest; as soon as that is satisfied, his title ceases. The amount due to him was not only tendered to him at the trial, but the plaintiffs made him an offer to redeem his mortgage before the suit was instituted. Had the defendant been unable to discharge the mortgage debt the case would be different. No such difficulty has been alleged; and the defendant has not been called to prove that, for any reason whatever, either on account of his wife's refusal, or

of that of the mortgagee, to join in the lease, or on account of his inability to redeem the mortgages, he is unable to perform the contract. The only question, then, is whether, in order to remove the difficulty *suggested* on the defendant's behalf—that Hirjibhái Hormasji refuses to join him in granting, or to allow him to grant, the lease—the plaintiffs have not a right to require the defendant to redeem the mortgage himself, or to allow them to redeem it. And this question seems to me to be settled by authority in the affirmative. In *Keech v. Hall.* (j) Lord Mansfield lays down the rule, that where a lease is a beneficial one (and the lease in this case clearly is so), "the tenant may put himself in the place of the mortgagor, and either redeem it himself or get a friend to do it." In *Costigan v. Hastler* (k) Lord Redesdale says that if a person undertakes to do a thing which he can himself do, or has the means of making others do, the court compels him to do it, or procure it to be done, unless the circumstances of the case make it highly unreasonable to do so. And this decision was approved of and followed by Sir John Stuart, V.C., in *Hutton v. Breton.* (l)

I am, therefore, of opinion that if Hirjibhái Hormasji still refuses to concur with the defendant in granting the lease to the plaintiffs, the defendant must be compelled either to redeem the mortgage himself, or to allow the plaintiffs to do so. On the whole, I consider that the plaintiffs are entitled to a specific performance of the contract which the defendant has entered into with them; and that the issues, so far as they are not hereinbefore virtually answered, must be decided in the plaintiff's favour.

The Decree will therefore be as follows:—

Declare that the agreement in the plaintiffs' plaint mentioned or referred to, ought to be carried into execution, and decree the same accordingly. Let the defendant execute to the plaintiffs a lease of the piece of land and messuage in the said agreement referred to for the term therein mentioned, and let such clauses and conditions be inserted in the

(j) Doug. 21.

(k) 2 Sch. and Lef. 166.

(l) 9 Jur. N. S. 1310.

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said lease as are contained in the lease of the 4th of October 1859 in the said plaint mentioned, or clauses and conditions as nearly similar thereto as the circumstances of the case will admit of; such lease to be settled by the Commissioner in case the parties differ. Let the plaintiffs execute to the defendant a counterpart of the said lease; such lease and counterpart to be at the equal expense of the plaintiffs and defendant. Defendant to pay plaintiffs' costs of suit, to be taxed. Liberty to apply.

Attorneys for appellant:—Keir, Prescot, and Winter.

Attorneys for respondent:—Cleveland and Peile.

NOTE.—With reference to the statement, in Mr. Justice Westropp's judgment in the above case, that he had been unable to discover whether the Judges of the Supreme Court had been consulted on the petition of the Pársis, presented in March 1836 to the Bombay Government, praying for legislative relief with regard to the descent of immovable property, the Editor of these Reports is authorised by Mr. Justice Westropp to say that, since the delivery of that judgment, he has received a communication from Sir John Awdry, informing him that the idea of affording to Pársis, the relief which they sought from the English law of inheritance of real (freehold) property, by applying to the transmission of their immovable property, in cases of death and intestacy, the English law of succession to chattels real, originated with Sir John Awdry, and the draft of Act IX. of 1837 (subsequently laid before the Indian Law Commissioners and the Indian Legislature) was prepared by him for that purpose. After stating that the question of inheritance according to the English law of freehold property did arise amongst the Pársis, and, after referring to Act IX. of 1837, he writes: “No doubt Mr. Roper, as Acting Advocate General, would be consulted upon it. But the idea of *thus* cutting the knot was mine, and the draft, which was passed with only trifling alterations, was by me. I had been in communication with some of the leading Pársis in order to get a scheme of inheritance in accordance with their usages. But none was proposed which would be either *certain* or *reasonable* in the apprehension of an English lawyer. I felt that, if the property were divisible, it would be substantially what they required, and that it was better to adopt wholesale a well matured system than to legislate *de novo*. All this fixes indelibly on my memory that I held that Pársi inheritance was governed by English law.” In a previous part of the same letter Sir John Awdry wrote: “I do not believe I ever heard of Sir A. Anstruther's doctrine in *Doe d. De Silveira v. Texeira*; if I ever did, it was so clearly not the doctrine held in my time that it made no impression.” Sir John Awdry sat as a Puisne Justice of the Supreme Court from the 31st of December 1830 until the 29th of January 1839, when he became Chief Justice. The latter office he held until the 2nd of March 1841.

Although *Doe d. De Silveira v. Texeira* was decided in 1817, it was not published until 1849, and then by Mr. Morley in the 2nd volume of his Digest.—ED.

*Referred Case.*NENBAI, widow and administratrix &c....*Plaintiff.*HAIM MUSA'JI and his wife, DA'DI*Defendants.*1867.
August 9.*Small Cause Courts' Act, No. IX. of 1850, Secs. 42 and 46—Personal attendance of Parties—Women of Rank—Practice—Construction.*

Held that Sec. 42 of Act IX. of 1850 does not necessitate the personal attendance of the plaintiff in court in the first instance; but that the plaintiff may appear by such other person as may, by the Rules of the Court, appear for a party in a cause.

When, however, the personal attendance of the plaintiff appears to the Judge to be necessary for the proper investigation of the cause, he may require it; unless the case comes within the privilege given by Sec. 46 of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

“This was a summons to recover Rs. 963, amount of defendants' joint and several promissory notes, with interest; and was called on before me on the 10th of April 1867.

“Mr. Macfarlane, Solicitor, appeared for the plaintiff. Mr. Hormasji, Pleader, appeared for the defendants. Haim Musáji was personally present in court; the other party was not present.

“When Mr. Macfarlane was about to state the plaintiff's case, Mr. Hormasji objected to my proceeding with the case, and required me to strike the case out of the list, under Sec. 42 of Act IX. of 1850. In answer to me, Mr. Hormasji stated that he was not instructed that the evidence of the plaintiff was material in the case.

“Mr. Macfarlane objected to produce his client on two grounds:—(1) That she was a Khojá lady of a rank in life which rendered her appearance in a Court of Justice contrary to the customs of her religion and community; (2) that she could give no evidence in the case, the transaction in question having been carried on through her agent and son-in-law, Mír Alí Dharamsi.

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" Mír Alí Dharamsi, being affirmed, stated that the plaintiff was his mother-in-law ; that he managed her business, and held a general power of attorney from her ; and that she was not present when the money was advanced to the defendants. He further stated that he had known the plaintiff for about twelve years : that she was a lady of rank in the Khojá community ; that her husband had been a merchant and a setiá amongst the Khojás : that during the time he had known her she had had several suits in the High Court, and in the Court of Small Causes, and that she had never attended personally in court : that he had managed these cases for her ; and that it was contrary to the custom of the Khojás for a lady of the plaintiff's position to appear in court ; that she went out in a carriage, and did not put on a *paḍadá* : that she went to dinners of her own community, but not to those of others ; and that it was forbidden by the rules of the community that she should come to court.

" Haim Musáji (the defendant), being sworn, stated that there are no *paḍadá* ladies among the Khojás, and that he first knew the plaintiff about eighteen months ago ; that he knew of the plaintiff going to the bázár to purchase articles for the household. He further stated that it was the plaintiff herself who gave him the money ; that she was a wealthy woman, but he did not know that she was of high rank in the caste. He stated that his wife, the second defendant, could not come to court as long as he, her husband, was alive. This witness is a Jew.

" I find that the plaintiff in this case is a lady of rank in the Khojá community ; that it is not her custom to appear personally in court ; and that her evidence is not material in the present case.

" The practice of the court I find to be, to require the personal attendance of the plaintiff whenever it is required by the defendant ; except in the case of native traders not resident in Bombay, who trade here by means of their *Muníms*, in which cases the *Muním* is allowed to appear for the plaintiff on the record. And, subject to the opinion of the High

Court on the question whether, under these circumstances, I should have required the attendance of the plaintiff, I give the following judgment:—

“Case struck out, for non-attendance of the plaintiff, under Sec. 42 of Act IX. of 1850. No costs to either party.

“And I request the opinion of the High Court as to whether I was right in so doing.”

The case came on for hearing this day before COUCH, C.J., and WESTROPP, J.

Howard, for the plaintiff:—Sec. 42 of the Small Cause Court Act (No. IX. of 1850) was relied upon as requiring the personal attendance of the plaintiff; but that section (a) was taken almost *verbatim* from Sec. 79 of 9 & 10 Vic., c. 95, the English County Courts' Act. The Rules of the Small Cause Court in Bombay regulate the fees to be allowed to Barristers and Attorneys and to Pleaders, who appear for parties; and there is no reason for requiring the plaintiff's personal attendance; unless the evidence of the plaintiff should, in the opinion of the Judge, be necessary; and even then a lady of rank is exempt from attendance, under Sec. 46 of the Act. (b)

The Advocate General (*Hon'ble L. H. Bayley*), for the defendant:—The question here is what is the law laid down

(a) “If, upon the day of the return of any summons, or at any continuation or adjournment of the said Court, or of the cause for which the said summons shall have been issued, the plaintiff shall not appear, the cause shall be struck out; and if he shall appear, but shall not make proof of his demand to the satisfaction of the Court, the Judges may nonsuit the plaintiff or give judgment for the defendant; and, in either case, where the defendant shall appear and shall not admit the demand, may award to the defendant, by way of costs and satisfaction for his trouble and attendance, such sum as they, in their discretion, shall think fit: and such sum shall be recoverable from the plaintiff by such ways and means as any debt or damage ordered to be paid by the same Court can be recovered: provided always, that if the plaintiff shall

not appear when called upon, and the defendant, or some one duly authorised on his behalf, shall appear, and admit the cause of action to the full amount claimed, and pay the fees payable in the first instance by the plaintiff, the Court, if it shall think fit, may proceed to give judgment, as if the plaintiff had appeared.”

(b) “On the hearing or trial of any action, or any other proceeding, under this Act, the parties thereto, their wives, and all other persons, may be examined, on behalf of either the plaintiff or defendant, subject nevertheless to the Acts and Regulations in force, with respect to the examination of women of a rank and situation in life which, according to the customs of the country, would render it improper to compel them to appear in a Court of Justice.”

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in Sec. 42 of the Act. Some effect must be given to the words "the defendant, or some one duly authorised on his behalf." Sec. 91 of the County Courts' Act provides as to who may appear for a party to the suit. There is no such provision in the Small Cause Court Act, except as to the defendant, in Sec. 42.

COUCH, C.J. :— I am of opinion that the plaintiff is not bound by the Act to appear in person. If the words of the Act were, "If the plaintiff shall not appear *in person*, the cause shall be struck out," we should, notwithstanding the inconvenience, be bound to give effect to the language of the Legislature; but as the words used are consistent with a more reasonable construction of the Act, and as that construction is also more convenient, I have no hesitation in adopting it. I think, then, that the words of Sec. 42 mean that the plaintiff may appear in person, or by such other person as may, by the Rules of the Court, appear for a party in a cause.

With reference to the alternative words used in the latter part of the section: "Provided always, that if the plaintiff shall not appear when called upon, and the defendant, *or some one duly authorised on his behalf*, shall appear, and admit the cause of action to the full amount claimed, &c.," I think sufficient effect is given to them, if it is considered that this is a special provision, by which the defendant, though not appearing in person, is to be bound by *an admission* of the cause of action to the full amount claimed, when made by *some other person* on his behalf. The "some one duly authorised" in such a case need not, and in very many cases, probably, would not, be a professional representative of the defendant; and therefore the Legislature requires due proof of the authority to admit the claim.

Where the personal attendance of the plaintiff in court appears to the Judge to be necessary for the proper investigation of the case, he may require the plaintiff's attendance; unless the case is within the privilege given by Sec. 46 of the Act.

WESTROPP, J. :—I quite concur. The learned First Judge of the Court of Small Causes acted under the feeling which every judicial officer ought to act—namely, that where he found a long established court practice, he must take it to be the law of the court until it was overruled by a higher tribunal, or by the Legislature. In conformity with that principle, he decided that this case ought to be struck out of the list ; but, with the view of having such an inconvenient practice canvassed, he sent the case up to this court, in order that if the practice be wrong it should be set right. And that it was wrong there could be no doubt. Unless the language of the Act were imperative, it could not be a proper course to insist upon the presence of a plaintiff who knew nothing about the case. And this appeared to be the position of the plaintiff in this case. It might be a question, too, whether she would not have been entitled to the privilege given by the 46th section of the Act ; but the Judge did not raise that question ; possibly he refrained from doing so, in order to raise the general question.

If the evidence of a plaintiff appeared to be necessary, it was in the power of the Judge to require his attendance, and adjourn the case until the appearance of the party, or until his appearance was rendered unnecessary,—for instance, by his admitting the fact which the defendant desired to elicit from him on examination. If the plaintiff's appearance be or become unnecessary, it would be a vexatious thing to compel him to attend. The Judge was not bound to depend on the *ipse dixit* of the defendant as to the necessity for the plaintiff's presence. He ought to satisfy himself, by reasonable inquiry, that it was necessary that the plaintiff should attend, before insisting upon such attendance. Of course, if he arrived at the conclusion that the plaintiff was absenting himself improperly from the trial, and evading a necessary examination, the Judge might adjourn the hearing, and eventually, if necessary, and after reasonable notice to attend had been given, strike out the case.

It would be an extreme inconvenience to hold that in every case the plaintiff must appear ; merchants or other

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persons in Europe or elsewhere had many dealings, through their Bombay agents, with residents of Bombay, of which transactions the agents and their servants alone were cognisant, and the absent parties, in Europe or elsewhere, knew nothing whatever, and could not shed a single ray of light upon the case. It would under such circumstances be an idle and vexatious denial of justice to prevent them from suing unless they appeared in person in the Court of Small Causes, for no other purpose than to lend the grace of their presence to the scene.

Neither in the 38th or 42nd sections of Act IX. of 1850, nor in any other part of that Act, was there any language so peremptory as to necessitate the adoption of a construction which would entail so much injustice. To the phrase "appear" applied to a party in a suit, the ordinary legal meaning given, unless the context forbade it, was that he shall appear either in person or by attorney or counsel.

The answer which this Court should give to the learned First Judge was that which he was anxious to receive, namely, that the case ought not to have been struck out under the circumstances mentioned by him, and ought to be restored to his list. It would be the reverse of a kindness to defendants owing small sums of money, to hold that they must be put to the greater expense of a suit in the High Court, if the plaintiffs were unable personally to appear in the Court of Small Causes.

NOTE.—The practice of requiring the attendance of the plaintiff in the Small Cause Court was not a uniform practice prevailing since the establishment of the Court; but it was sanctioned for some years by the late First Judge, Mr. Hore, whose opinion in the matter the majority of the other Judges followed.—ED.

*Referred Case.***ESSA'JI A'DAMJI v. BHIMJI PURSHOTAM.**

Immoveable Property—Sale by Auction—Conveyance—Deposit—Stakeholder.

1867.
August 9.

In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer; the vendor having refused to convey to the purchaser, save by a deed, which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice:—

Held (1) that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit; and (2) that the money, having been deposited with the auctioneer as a stakeholder, and being in his hands, the action to recover it lay against the auctioneer, and not against the vendor.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850 and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

“This was a suit to recover the sum of Rs. 775, with interest, paid by the plaintiff to Messrs. Crawford and Co., auctioneers, at the request of the defendant, as a deposit on account of the purchase-money of certain premises sold by the defendant to the plaintiff, but which the defendant refused to convey to the plaintiff.

“The case was tried by me on the 9th of January 1867. Mr. Marriott was counsel for the plaintiff. Mr. Carter was attorney for the defendant.

“It appeared that on the 17th of January 1866, certain premises were, by the order of the defendant, put up to auction by Messrs. Crawford and Co. At this sale the plaintiff was declared the purchaser of a portion of those premises, at the price of Rs. 3,100.

“The conditions of sale (with translation of Gujarati portion annexed) are herewith sent up marked L. The property purchased by the plaintiff was that described in this document as ‘Lot Number 2.’

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"The plaintiff having been declared purchaser, as aforesaid, paid to the auctioneer Rs. 775 as a deposit, in compliance with the second condition of sale (L); and that sum was, on the day of the hearing, still held by the auctioneer.

"After the sale, the correspondence contained in the letters hereunto annexed, marked A to K inclusive, took place.

"On December the 6th, 1866, the defendant caused the property to be sold to a third person.

"The defendant pleaded:—1st, That the money having been paid to the auctioneer as a stake-holder, the plaintiff, even if entitled to recover the sum claimed, should have proceeded against the auctioneer, and not against the present defendant. 2nd, That he did not refuse to execute a conveyance in the form required by the plaintiff. 3rd, That the plaintiff never called on the defendant to execute a conveyance of the property. 4th, That, at the sale on 17th January 1866, a certain deed dated 22nd July 1864, and referred to in letter marked H and in the draft conveyance D, was produced; and that the plaintiff then had notice that the property would be described in the conveyance in the words in which it was described in the said deed of 22nd July 1864.

"In addition to the documentary evidence the following facts were proved:—

1st.—The auction was held on or near the premises, and at the sale the premises were actually pointed out to plaintiff by metes and bounds, but no one on the part of the defendant ever afterwards pointed them out to the plaintiff.

2nd.—At the auction the auctioneer, after a communication with the defendant, erased the figures '198' from the Gujarati handbill describing the property, and wrote in the margin 'ground as per boundary' (see L), and read it out in that way, and not as printed, and did not state that any particular number of yards were contained in Lot 2.

3rd.—The deed of 22nd July 1864, recited in draft conveyance D, was not shown to plaintiff at the auction, nor was any notice of its contents then given to him, nor

was he then informed that the property would be conveyed to him only as described in the said, or any other, deed.

4th.—No engrossment of the conveyance was ever tendered by the plaintiff to the defendant for execution, nor was the residue of the purchase-money tendered to him.

5th.—It was not proved that the boundaries in draft conveyance D were identical with those given by the auctioneer at the sale.

“On the correspondence taken in connection with the above facts, I was of opinion—

1st—That the vendor had refused to convey the premises to the plaintiff, save by a deed which should describe them as described in the deed of July 22nd, 1864, and should refer to that deed;

2nd—That the vendor was not entitled to import the deed of 22nd July 1864 into his conveyance to the plaintiff, so as to restrict the operation of his conveyance to such premises as might be comprised in the said deed of July 1864;

3rd—That by refusing to execute any other conveyance than that described, the defendant had released the plaintiff from the obligation (if any) of tendering the engrossment of the conveyance and the residue of the purchase-money; and

4th—That the plaintiff might recover in this action from the defendant, although the money had been deposited, and remained, with the auctioneer.

“At the request of Mr. Carter, for the defendant, I reserved the following questions for the opinion of the High Court :—

I. Whether the plaintiff was bound to have tendered a conveyance engrossed to the defendant, for execution, together with the residue of the purchase-money, before bringing this action.

II. Whether, the money having been deposited with the auctioneer as a stake-holder, and now being in his hands, the plaintiff can recover against the defendant.

“Subject to the opinion of the High Court on the above

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questions, I gave a verdict for the plaintiff for Rs. 775, with Rs. 121-8-6 interest thereon, and costs; and I certified Costs of Counsel Rs. 85."

The case was heard before COUCH, C.J., and WESTROPP, J.

Marriott (with him *Green*), for the plaintiff:—The Judge found that the defendant had refused to convey by a deed containing the description of the premises, which the plaintiff was entitled to have: Sugd. Vend., 13th ed., 22, Chap. 5. Sec. iv., plac. 25. He also found that, on the 6th of December 1866, the defendant caused the property to be sold to another person. This was before the suit was brought. Dart, Vend., 3rd ed., 617; *Franklyn v. Lamond* (a); *Lovelock v. Franklyn*. (b) As to the second point, an auctioneer is not a mere stakeholder; *Ballard v. Way*. (c)

Mayhew, for the defendant, cited *Johnson v. Roberts* (d); *Fenton v. Browne* (e); *Simmons v. Heseltine* (f); *Boymann v. Gutch* (g); *Duncan v. Cafe* (h); *Gray v. Gutteridge* (i); Sugd. Vend., 13th ed., 40. No point was made in *Ballard v. Way* that the auctioneer ought to be sued.

Dunbar, on the same side, cited *Barnford v. Shuttleworth* (j); and referred to Sugd. Vend., Ch. 17, Sec. 1., 38, where it is said that the purchaser cannot recover interest from the auctioneer.

Marriott was heard in reply.

Cur. adv. vult.

COUCH, C.J. :—As to the 1st question, I am of opinion that there was such a refusal by the defendant, that the plaintiff was not bound to go through the useless form of tendering an engrossment of conveyance to the defendant for execution, together with the residue of the purchase-money, before bringing his action.

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| (a) 4 C. B. 637; 16 Law J., C. P. 221. | (f) 28 Law J., C. P. 129. |
| (b) 8 Q. B. 358; 15 Law J., Q. B. 145. | (g) 7 Bing. 379. |
| (c) 1 M. & W. 520. | (h) 2 M. & W. 244. |
| (d) 24 Law Times 234. | (i) 1 M. & R. 614. |
| (e) 14 Ves, 144. | (j) 11 A. & E. 926. |

As to the 2nd point, the auctioneer, although for many purposes an agent, is for this purpose a stakeholder: *Burrough v. Skinner* (k). And the money having been deposited with him as a stakeholder, and being in his hands, the plaintiff could not recover against the defendant, but should have sued the auctioneer.

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I am, therefore, of opinion that judgment should be entered for the plaintiff in the Court of Small Causes; but that, as the decision is not on the merits, each party should bear his own costs.

WESTROPP, J., concurred.

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Referred Case.

LAKHMIDA'S HIRA'CHAND v. THE GREAT INDIAN
PENINSULA RAILWAY COMPANY.

Aug. 17.

Silk—Dhotra—Value of Silk—Evidence, question of—Act XVIII. of 1854, Sec. 10—Act IX. of 1850, Sec. 55—Act XXVI. of 1864, Sec. 7.

Whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture, are "silks in a manufactured or unmanufactured state, wrought up or not wrought up with other materials," within the meaning of Act XVIII. of 1854, Sec. 10, is a question of fact, to be decided on the evidence, not a question of law, to be reserved for the opinion of the High Court, under Act IX. of 1850, Sec. 55, and Act XXVI. of 1864, Sec. 7.

Brunt v. The Midland Railway Company (33 L. J., Ex. 137) followed.

Semblé: The proper test for a Judge to apply in such cases, is to determine whether or not the value of the silk wrought up with other materials is more than half the value of the fabric. If it be not, the fabric cannot be considered to be silk, within the meaning of the Act.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

"This suit was instituted to recover from the defendants the sum of Rs. 794-14-3; being damages for non-delivery of a bale of piece goods, intrusted to the defendants, to be carried on the defendants' railway for hire.

"At the trial, Mr. Hurrell, for the defendants, admitted that the Company had received the bale; that they had

(k) 5 Burr. 2639.

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G. I. P. R. Co.** not delivered it ; and that the value of it, at the place where it should have been delivered, was Rs. 775, which was the value of the goods according to the evidence for the plaintiffs. The defence was that the goods were silk, or at least were goods which came within the operation of Sec. 10 of Act XVIII. of 1854.

" On the evidence for the plaintiffs, it appeared that the bale in question consisted entirely of *dhotre*, that is, cotton cloths about six yards long by three-quarters of a yard wide, with a border of silk at the ends, varying from one in some *dhotre* to three inches in others. The plaintiff did not produce the invoice, but stated that the *dhotre* varied in value from Rs. 10 to Rs. 4 ; that they were all silk-bordered ; and that the value of these *dhotre* without the silk border would vary from Rs. 7 to Rs. 2 or Rs. 2½. Plaintiff himself stated that the silk border of a *dhotra* made a difference of about Rs. 2 in the value of the article.

" Under these circumstances, I was of opinion that the Company were, by Sec. 10 of Act XVIII. of 1854, exempted from liability for the loss.

" The plaintiff thereupon required me to give judgment, contingent upon the opinion of the High Court, upon the following question :—Did the fact that the *dhotre* were, to the extent set forth in the evidence for the plaintiff, composed of silk, exempt the Company from liability for their loss. Subject to the opinion of the High Court on the above question, I give a verdict for the defendants."

9 Aug. The case came on for hearing this day, before COUCH, C.J., and WESTROPP, J.

Dunbar (White with him), for the plaintiffs, cited *Brunt v. The Midland Railway Company* (a), *Bernstein v. Baxendale*. (b)

Green (Howard with him), for the defendants, commented on the cases cited (*suprà*).

Dunbar in reply.

Cur. adv. vult.

(a) 33 Law J., Ex. 187 ; S. C. 10 Jur., N. S. 181.

(b) 28 Law J., C. P. 265 ; S. C. 5 Jur., N. S. 1056.

COUCH, C.J. :—The articles in question are stated by the First Judge of the Small Cause Court to have been sent by the plaintiff to be carried on the defendants' railway. No other evidence except that of the plaintiff was given as to the value and composition of the goods. The border made a difference, taking an average, of about Rs. 2 in the value of each article. In some of them the value of the silk amounted to 2 in 7 or 2½ in 7. In no case was the value of the silk more than one-half of the entire value. There is no evidence before us as to what quantity were of so small a value as Rs. 4 or 4½.

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The Judge has referred to us the question, whether these articles are, or are not, silks wrought up with other materials. This is not a question of law, which, by Act XXVI. of 1864, the Judge had power to reserve for the opinion of this court. In *Brunt v. The Midland Railway Company* three of the Judges treated it as a question of fact, to be dealt with by the Court sitting as a jury. So that the Judge is not proceeding under the Act in submitting this question for our opinion ; but as it has come before us, I think it right to express our opinion upon it as a question of fact : and as a question of fact I consider that these articles are not silks wrought up with other materials within the meaning of the Act.

I should take as a general test in these cases, whether the value of the silk is more than half of that of the whole article. This consideration would appear to have influenced the judgment of the Court in *Brunt v. The Midland Railway Company*. The evidence in this case, as stated by the Judge, fails to show that the silk here bore so large a proportion to the other materials as to bring the goods within the denomination of silks wrought up with other materials within the meaning of the Act.

WESTROPP, J. :—I concur in holding that the articles in this case do not fall within the meaning of the 10th section of the Act, as silks wrought up with other materials.

Not long ago an appeal was brought by Mr. Hayes, Traffic Manager on the Bombay, Baroda, and Central India Rail-

1867. way, against Vasantrám Bhikáridás, who had sued the
 LAKHMIDA'S company in the court below for goods which had been lost
 HIRACHAND by the Railway Company. The value of the goods as a
 v. whole had been ascertained by the Judge of the court be-
 G. I. P. R. Co. low, but the value of the proportion of silk and the other
 materials had not been ascertained ; and the Appellate Court,
 consisting of myself and Mr. Justice Tucker, reversed the
 proceedings of the court below, and directed a new trial,
 upon issues framed for the purpose of ascertaining the value
 of the silk in the goods, and also the value of the gold in the
 goods (c). Some of the goods in that case were similar to
 those in this case—*dhotré*, with silk borders, and some of
 them with gold in the borders, and the total value of each
 material was the chief point remaining to be ascertained.

In the Court of Exchequer, in the case of *Brunt v. The Midland Railway Company*, the question was treated as a question of fact, and in deciding it the Court appeared to be guided by a principle, which principle was to ascertain whether the silk was the major part of the value ; and they came to the conclusion that it was, inasmuch as it stood in the ratio of 9 to 7 to the other material ; and, accordingly, the Court found that the goods came within the section. Here the value of the silk was far below the value of the other material in many of the articles, and in no instance did it exceed one-half. I, therefore, think that the case does not come within the terms of the section.

(c) See order of 10th January 1866 made in that case.

*Referred Case.*1867.
Aug. 24.

EWART, LATHAM, & Co. v. HAJI MUHAMMAD SIDDI'K.

Small Cause Court—Jurisdiction—Balance of Account—Set-off—Part Payment—Counter Claim—Credits by Agreement—Agency—Authority—Account-Sales—Commission to take Evidence.

The plaintiffs advanced Rs. 15,000 against the defendant's grain, consigned to Hongkong, to be there sold on his account by the plaintiffs' agents. The plaintiffs subsequently gave credit to the defendant for Rs. 14,115-3-3, alleged to have been received by them as the proceeds of the sale, and sued him for the balance in the Bombay Small Cause Court, abandoning the excess so as to bring the claim within the court's extended jurisdiction of Rs. 1,000. The defendant disputed the correctness of the account-sales forwarded by the agents at Hongkong, and contended that the court had no jurisdiction to try the case; and the Judge, subject to the opinion of the High Court upon the facts as stated, struck the case out of the list for want of jurisdiction:—

Held, that as both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant, the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, was in the nature of a part payment; and that the suit was, therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXIV. of 1864, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes:—

“In this case the plaintiffs, abandoning a portion of their claim to bring the case within the jurisdiction of the Court of Small Causes, sought to recover the sum of Rs. 1,000 from the defendant, being part of the sum of Rs. 1,355-14-5, balance of an account, a copy of which was annexed to the summons.

“In or about the month of May 1865, the defendant consigned certain bags of rice and grain to Hongkong, through the plaintiffs, to be there sold by the agents of the plaintiffs, for the account of the defendant.

“Against this consignment the plaintiffs, on the 26th of May 1865, advanced to the defendant the sum of Rs. 15,000. The plaintiffs allege that down to August 1865 the defendant

1867. was indebted to them in this sum with interest, amounting
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THAM, AND CO. to Rs. 15,380.

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 MAD SIDDI'K. "On the 7th of August 1865 and the 25th of October 1865, the plaintiffs gave credit to the defendant for certain sums, alleged to have been received from the plaintiffs' agents at Hongkong, as the proceeds of the sale of the defendant's grain, and amounting in all to the sum of Rs. 14,115 3q. 3r., leaving a balance due to the plaintiffs of Rs. 1,264 2q. 16r. This balance with interest, amounting in all to Rs. 1,355 3q. 61r., the plaintiffs claim to be due to them from the defendant.

"The defendant disputed the correctness of the account-sales ; and pleaded want of jurisdiction in this court to try the case.

"The plaintiffs contended that the amount of their claim was properly reduced, by payments on account and by abandonment of the excess, to a sum within the jurisdiction of this court ; that the sum of Rs. 14,115-3-3, for which the plaintiffs gave credit to the defendant as against the plaintiffs' original claim of Rs. 15,380, was not in the nature of a set-off, but was a payment on account ; and, therefore, whether the defendant disputed the correctness of the payment or not, this court had jurisdiction to hear and determine the case.

"The plaintiffs further contended that the account-sales, having been received in the ordinary course of business from the plaintiffs' agents in Hongkong, were *prima facie* evidence of the correctness of their own contents, and that the burden of proof lay on the defendant.

"In the first place, I was of opinion that the sum of Rs. 14,115-3-3, for which the plaintiffs give credit to the defendant, did not come within the description of cash payments on account, by which, according to the law and practice of this court, a plaintiff has always been permitted to reduce a claim of over Rs. 1,000, so as to bring it within the jurisdiction of the court.

"Secondly, even supposing this was such a cash payment, I was of opinion that this court could not properly, or at all,

investigate the facts of the case. Admitting that the production of the account sales threw the *onus* of proving the incorrectness of their contents on the defendant; then, as this court could not, at any stage of the proceedings, have granted a commission to the defendant to take evidence at Hongkong, the effect would be, that the defendant would be absolutely concluded by the statements in the account-sales; whereas he ought, in justice, to be allowed an opportunity of proving the incorrectness of their contents, if they were incorrect.

"For the above reasons, I was of opinion that this court had no jurisdiction to try the case.

"The plaintiffs having required me to give judgment, subject to the opinion of the High Court, on the question:—Upon the facts stated in this case, has the Bombay Court of Small Causes jurisdiction to try and determine the question between the parties. Subject to the opinion of the High Court on the above question, I struck the case out of the list, for want of jurisdiction.

"Should the High Court be of opinion that I was wrong in so doing, the case will be restored to the list, and heard in due course."

16 Aug. The case came on for hearing this day, before COUCH, C.J., and WESTROPP, J.

White, for the plaintiffs:—The question is, whether the receipt by the plaintiffs of the proceeds of the consignment, for which they give credit to the defendant, is not more in the nature of a part payment than of a set-off. Looking at the transaction in substance, it was an authority by the defendant to the plaintiffs to pay themselves the amount, which they had advanced to him, out of the proceeds of the consignment; and the defendant cannot say that the plaintiffs received less than they admit. It is of the essence of the agreement between the parties here, that the proceeds of the sale should be allowed for by the plaintiffs. They could not sue for the whole advance of Rs. 15,000. Either party could only sue for a balance. If damages are claimed by the

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1867. defendant in the Small Cause Court for negligence in effecting the sales, he must bring a separate suit. The following cases were cited: *Jenkinson v. Morton* (a); *Woodhams v. Haji Muhamad Siddi'k*. *Newman* (b); *Re Ackroyd* (c).

Green, for the defendant:—This is a case of detainer, not of payment. If the defendant disputes the amount credited by the plaintiffs, the court must try the question how much was realised by the sales. The fact that the Legislature has not given the Small Cause Courts the power to issue a commission to take evidence elsewhere, shows that it was not intended to give them jurisdiction to try cases like the present. *Woodhams v. Newman* (*suprà*), *Beswick v. Capper* (d), *Awards v. Rhodes* (e), were referred to.

White was heard in reply.

Cur. adv. vult.

Couch, C.J.:—I am of opinion that the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, is in the nature of a part payment; and that the suit is, therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes.

The defendant authorised the agents at Hongkong to sell the grain, and remit the proceeds to the plaintiffs in Bombay, in payment of the sum advanced by them to the defendant; and both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant.

The cases of *Woodhams v. Newman* and *Beswick v. Capper* decide that a plaintiff cannot treat a counter-claim of the defendant as a payment in reduction of the plaintiff's demand, without an assent on the part of the defendant; but if the parties have reduced the amount by payments, or by settling and ascertaining a balance, so as to bring it within the limit, the court has jurisdiction to try the case.

(a) 1 M. & W, 300.
 (b) 7 C. B. 604; 18 Law J., C. P., 213; 13 Jur. 456. (c) 1 Ex. 490.
 (d) 7 C. B. 669; 18 Law J., C. P., 216. (e) 8 Ex. 318.

In *Joseph v. Henry* (f) the facts were like those of the present case. The defendant's wife having accepted two bills of exchange, amounting together to above 20*l.*, the plaintiff, as indorsee, levied a plaint in the County Court of S. for the sum of 4*l.* 19*s.*, the balance alleged to be due. The drawer of the bill induced the defendant's wife, in his absence, to deposit with him some articles of jewellery belonging to the defendant, which were handed by him to the plaintiff. The plaintiff sold these articles, and treated the proceeds of the sale as part payment. Upon the hearing of the plaint, the defendant produced evidence to show that his wife had no authority to accept the bills, or to deliver the articles in question to the drawer of the bills, and contended that the plaintiff had, therefore, no right to sell the jewellery, or appropriate the proceeds of the sale as a part payment of the bills; and, therefore, that, as the demand originally exceeded 20*l.*, the Judge of the County Court had no jurisdiction. The Judge, however, gave a verdict in favour of the plaintiff for the balance claimed, on the ground that the articles given were in part payment. An application was then made for a prohibition to restrain the Judge of the County Court from proceeding further in the suit: but the Court refused to grant the writ, because the plaint, on the face of it, stated a matter within the jurisdiction of the court, and the facts on which the question of jurisdiction arose were contested. The Judge was at liberty to inquire into them, and his decision on the merits was founded on the very point on which the question of jurisdiction arose.

In that case it was admitted that the County Court had jurisdiction, if the defendant had assented to the goods being appropriated in the way the plaintiff sought to establish; but it was contended that there was no such assent shown, but on the contrary, the defendant throughout repudiated the right of the plaintiff to do so. *Coleridge*, J., in giving judgment, said:—"The Judge, however, has arrived at a conclusion of fact, if we understand him as stating that he considered the defendant to have conferred the power of

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1867. ~~EWART, LA-THAM, AND CO.~~ sale and appropriation of the proceeds on the plaintiff, which would certainly give him jurisdiction. * * * *
 HAJI MUHAMAD SIDDI'K. The plaintiff claims a sum under 20*l.*, the balance remaining due on two bills of exchange, together amounting to 23*l.* He cannot recover, unless he proves the sum due as a balance remaining due on those bills; and, if he proves that, the Judge has jurisdiction. Now this court cannot review his decision on the merits. Moreover, even after the objection made to the jurisdiction, as that did not arise upon the face of the proceedings, but was founded on facts contested and to be proved, the Judge had clearly power to inquire into those facts. If, upon the inquiry, he had found that the money claimed was not a balance remaining due, for that no part of the 23*l.* could be considered as paid, it would have been his duty to have abstained from proceeding further, and the court has no right to presume that he would not."

In this case the Judge, in coming to the conclusion that he had no jurisdiction, appears to have been influenced by the fact that the Small Cause Court has no power to issue a commission to take evidence; but the defendant may bring a suit, if he has any ground of action, and may show that the consignment produced more than he was allowed for by the plaintiffs, and the Court may inquire into this.

I am therefore, of opinion, that, upon the facts stated in the case, the Court of Small Causes had jurisdiction to determine the question between the parties, and that the Judge ought to have given judgment for the plaintiffs for the amount claimed, with costs; and that the defendant should pay the costs of reserving and stating the case for the opinion of this court.

WESTROPP, J. :—I fully concur.

Judgment reversed.

Referred Case.

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Sept. 27.

VINA'YAK VA'SUDEV v. RITCHIE, STEUART, & Co.

Sheriff's Poundage—"Debt levied by execution"—"Taking the body in execution for"—Subsequent discharge of debtor from custody—Ancient Instrument—Ambiguity—Construction—Usage and Practice of Court—Act VIII. of 1859, Secs. 273, 275—Act XXIII. of 1861, Sec. 8—Act VI. of 1855—Act VIII. of 1852—28 Eliz., c. 4—5 & 6 Vict., c. 98—24 & 25 Vict., c. 104, Secs. 11 & 15—Charter 20 Charles II. (27th March 1668)—Letters Patent of Mayor's, Recorder's, and Supreme Courts, Bombay—Tables of Fees—Supreme Court Rules of April 1852.

In a suit brought in the Bombay Court of Small Causes to recover Sheriff's Poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested H., who applied to the High Court under Sec. 273 of Act VIII. of 1859, and was ordered to be discharged from custody; the Judge found for the defendants with costs, subject to the opinion of the High Court.

Held (1) that the words "debt levied by execution" used in the Table of Fees for the Recorder's Court, and continued in the subsequent tables, being ambiguous, the rule applies that "if an instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction;" (2) that as the Sheriff is the officer of the court, and his fees are received under its authority, it was unnecessary to refer the case back to the Small Cause Court in order that evidence of usage might be taken; (3) that, having regard, as well to the usage and practice of the Supreme Court, as to the liability of the Sheriff at the time the old Tables of Fees were settled, the words used must be construed as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and (4) that if the Sheriff's right accrues upon his executing the warrant, the subsequent discharge, by the Court, of the defendant from custody ought not to divest him of it.

CASE stated for the opinion of the High Court of Judicature, pursuant to the provisions of Sec. 55 of Act IX. of 1850, by John O'Leary, Acting First Judge of the Bombay Court of Small Causes.

"This was a summons to recover the sum of Rs. 303-4-10, as sheriff's poundage on the amount indorsed on a writ of *capias ad satisfaciendum* issued by the defendants, and under which the plaintiff, at the request of the defendants, arrested the person of one Hattesing Kallianji.

"The facts of the issue of the writ, of the arrest of Hatte-

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sing at the defendants' request, and of the amount claimed being the proper amount, if any poundage is recoverable, and the liability of defendants, if the Sheriff is entitled to poundage, were admitted at the hearing.

"Hattesing, having been arrested as aforesaid, applied to the High Court, under Sec. 273 of the Code of Civil Procedure, and was discharged, as was stated in evidence, under the 274th section of the same Act, but probably under Sec. 8 of Act XXIII. of 1861.

"It appeared in evidence before me that Sheriff's poundage had never been paid in a case similar to the present; and that only one case of discharge, under Sec. 274 of the Code, or Sec. 8 of Act XXIII. of 1861, had occurred in Bombay, namely, the case of Berámji Frámji Kámá, and that in that case no demand was made by the Sheriff for poundage.

"It was contended before me for the plaintiff that this was a case of a debt 'levied by execution,' within the meaning of Chapter VIII. of the High Court Rules, under which the Sheriff is entitled to poundage on every such debt.

"It was admitted by the plaintiff that, by the law and practice in Bombay, the Sheriff gets no poundage in cases where, after an arrest on a *capias*, the debtor is discharged under the Insolvent Debtors' Act.

"I was of opinion that this case was analogous to a discharge under the Insolvent Act, and that, in the absence of any express enactment or rule of court on the subject, the same rule should prevail as to poundage.

"Mr. Thacker, for the plaintiff, applied to me to state a case for the opinion of the High Court on the point. As the case appeared to me to be one of the first impression, to be of public importance, and not to be free from doubt, I consented to state a case under Sec. 55 of Act IX. of 1850.

"The question for the High Court is:—When a debtor is arrested on a writ of *capias*, and is discharged by the High Court under Sec. 274 of the Code of Civil Procedure, or under Sec. 8 of Act XXIII. of 1861, is the Sheriff entitled

to recover poundage from the plaintiff in execution, on the amount indorsed on the *capias*?

“Subject to the opinion of the High Court, I find for the defendant with costs; and I certify advocate’s costs at Rs. 30. Should the High Court be of opinion that the Sheriff is entitled to recover, a verdict should be entered for the plaintiff for the amount claimed, or such other order as to costs or otherwise, as to the High Court may seem fit, should be entered.”

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Aug. 17. The case came on for hearing this day before COUCH, C.J., and WESTROPP, J.

Mayhew, for the plaintiff:—The Sheriff’s right accrues immediately upon the writ being executed: *Graham v. Grill* (a); *Miller v. Abbott* (b); *Rawstorne v. Wilkinson* (c); *Lake v. Turner*. (d) The right to poundage accrues upon the arrest. “Levied by execution” must be taken to include the taking of the body in execution.

Howard, for the defendant:—In 28 Eliz., c. 4, there is a clear distinction between levying the debt and “take the body in execution for.” “Levied by execution” means a sum that is realised. The rules of the court provide for the fees that are to be paid to the Sheriff. There is no provision for poundage in an arrest. The creditor ought not to have to pay poundage, where by the act of the court he is prevented from getting anything. The practice of the Sheriff’s Office in cases of Insolvent Debtors binds the Sheriff.

Mayhew in reply.

Cur. adv. vult.

COUCH, C.J.:—This was a suit brought in the Bombay Court of Small Causes to recover the sum of Rs. 303-4-10, as Sheriff’s poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested one Hattesing Kallianji, who applied to the High Court under Sec. 273 of the Code of Civil Procedure, and

(a) 2 M. & S. 94, *Ibid.* 296.

(b) 1 Stra. Mad. Ca. 182.

(c) 4 M. & S. 250.

(d) 4 Burr. 1981.

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was ordered to be discharged from custody. And the Acting First Judge of the court has reserved for the opinion of this court the following question :—" When a debtor is arrested on a writ of *capias*, and is discharged by the High Court under Sec. 274 of the Code of Civil Procedure, or under Sec. 8 of Act XXIII. of 1861, is the Sheriff entitled to recover poundage from the plaintiff in execution, on the amount indorsed on the *capias* ;" and, subject to the opinion of this court, has found for the defendants with costs.

By the Stat. 24 & 25 Vict., c. 104 (an Act for establishing High Courts of Judicature in India), Sec. 15, it is enacted that each of the High Courts established under the Act shall have power to settle tables of fees to be allowed to the Sheriff, Attorneys, and all Clerks and Officers of Courts, and from time to time to alter any such table, and the tables so settled shall be used and observed in the said courts, provided that such tables be not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction in Bombay of the Governor in Council.

By virtue of this power, a table of fees was settled by the Judges of the High Court, and sanctioned by His Excellency the Governor in Council, and was, by an order of the court dated the 2nd of February 1863, ordered to be used and observed in the High Court from and after the date thereof. In this table amongst the fees to be allowed to the Sheriff is : " Poundage on every debt levied by execution, on every sum not exceeding Rs. 1,000, 2½ per cent. ; on every sum exceeding Rs. 1,000, 1½ per cent. ;" and this table is now in force.

By Sec. 11 of the before-mentioned statute, it is enacted that upon the establishment of the High Courts in the Presidencies respectively, all provisions then in force in India of Acts of Parliament, or of any order of Her Majesty in Council, or Charters, or of any Acts of the Legislature of India, which at the time of the establishment of such High Courts are respectively applicable to the Supreme Courts at Fort William in Bengal, Madras, and Bombay respectively, or to the Judges of those courts, shall be taken to be applicable to the said High Courts and to the Judges thereof respectively,

so far as may be consistent with the provisions of the Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers of the Governor General of India in Council.

The regard which is thus paid, by this, as well as by Sec. 15 (before mentioned), to the provisions of any law then in force, and the facts that the office of Sheriff of Bombay is an ancient office, and that the right to poundage was not given to the Sheriff for the first time in the establishment of the High Court, make it, we think, necessary that we should consider what his position and rights as to fees were under the Supreme Court.

Some faint traces of the existence of a Sheriff so early as the year 1671, or thereabouts, are to be found in the Government records of the island. The office was probably created by the local Government, with the assent of the London Company, under the Charter 20 Charles II. (27th March 1668), which made over Bombay to that company, and empowered the company to do all things necessary for the complete establishment of justice, and enabled them or the Governor of Bombay to delegate "judges and *other officers*" for that purpose.

However, the first direct recognition of the office of Sheriff by the Crown appears to have been by the Letters Patent to the East India Company dated the 24th of September 1726, by which the Mayors and Aldermen of Madras, Bombay, and Calcutta were constituted Courts of Record, by the name of the Mayor's Court, and the junior of the Council at each place at the time of the arrival of the Charter was appointed to be Sheriff, and was to continue in his office for one year, and until another should be duly elected and sworn into the office; and it was ordained that the Governor or President and Council, or the major part of them, should yearly, on the 20th of December, unless the same happened on a Sunday, and then on the next day, assemble themselves and proceed to the election of a new Sheriff.

The Letters Patent creating the Courts of the Recorders

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of Madras and Bombay, dated the 20th of February 1798, contain provisions that the person who shall be Sheriff at each of those places, at the time of the publication of the Charter, shall be and continue the Sheriff until another shall be duly appointed and sworn into the office, and that the Governor or President and Council for the time being, or the major part of them (whereof the Governor or President, or in his absence the senior of the Council, to be one) shall yearly, on the first Tuesday in December, appoint a new Sheriff for the year ensuing, to be computed from the 20th of December next after the appointment, and order and direct that the Sheriffs and their successors, or their sufficient deputies, shall, and they are authorised to execute all the writs, summonses, rules, orders, warrants, commands, and process of the courts, and to receive and detain in prison all such persons as shall be committed to their custody by the courts, or by the Recorders or any of the Judges thereof. And each of the courts is authorised and empowered to settle a table of fees to be allowed to the Sheriff, Attorneys, and all other the Clerks and Officers of the Court, for all and every part of the business to be done by them respectively, which fees, when approved by the Governor in Council, to whom authority is given to review the same, the Sheriff, Attorneys, Clerks, and other Officers shall and may lawfully demand and receive ; and the Court is authorised, with the like concurrence of the Governor in Council, from time to time, to vary the table of fees as there shall be occasion. The Letters Patent establishing the Supreme Court of Judicature at Bombay contain the same provisions.

Amongst the records of the Recorder's Court of Bombay is a book without date, but which it appears probable was written in 1798, containing the following entries :—

“THE SHERIFF.

“ For executing every writ, except summons and subpoena, and for every bill of sale, inventory, appraisement, and bail bond, Rs. 2.

“ Poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent. ; on every sum exceeding Rs. 1,000, 2½ per cent.”

And amongst the records of the Supreme Court is the following table of fees :—

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“THE SHERIFF.

“ For executing every writ, except summons and subpoena and for every bill of sale, inventory, appraisement, and bail bond, Rs. 2.

“ Poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent. ; on every sum exceeding 1,000 rupees, 2½ per cent.

“ For executing every writ of summons, subpoena, or other process or order of court on the Island of Salsette, for every two English miles, calculating only the distance out, Rs. 3.

“ For ditto on the Island of Caranja, Elephanta, Butchers' Island, &c., Rs. 8.”

“ For ditto in the harbour of Bombay, Rs. 3.”

On the 26th of April 1852 a new table of fees was substituted, which is to be found at page 200 of the printed Rules and Orders of the Supreme Court ; and by that the fee for executing every writ, except summons and subpoena, was reduced to R. 1, and the poundage to 2½ per cent. on every sum not exceeding Rs. 1,000, and 1½ per cent. on every sum exceeding Rs. 1,000, the same words being used as in the former table.

It thus appears that from the earliest time the words “levied by execution” were the only words used in the table of fees ; and, unless they were applicable to the taking the body of a debtor in execution under a writ of *capias*, the Sheriff was entitled to no other fee upon executing that writ, unless the debt were paid, than two rupees, and since 1852 one rupee.

In the table of fees of the High Court the only other fee applicable to a warrant for arrest in execution is :—“ For

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executing writs of execution against persons and effects, warrants for apprehension of witnesses, sequestration, and warrants for security to be furnished by defendants issued by the Court or by Mofussil authorities, for each defendant Rs. 2 ;" and the Sheriff, therefore, upon arresting and detaining a debtor in execution, if he is not entitled by this table to poundage, will, unless the debt be paid, receive only the same fee as upon apprehending a witness, and which fee he also receives upon executing a warrant for attachment of property.

The words used in the different tables of fees are not so precise as those of the Stat. 28 Eliz., c. 4, where the words "or take the body in execution for" are added; but in order to satisfy the word "levy" it is not necessary that the debt should have been paid: *Alchin v. Wells* (e), where the Sheriff was held to be entitled to his poundage for levying under a *fi. fa.*, though the parties compromised before he sold any of the goods; and we are of opinion that as the words "debt levied by execution" used in the table of fees for the Recorder's Court have been continued in the subsequent tables, without any apparent intention that they were to receive a different construction, we ought, in determining what is their meaning, to resort to evidence of usage. There is such an ambiguity in the table as to justify the application of the rule, that if an "instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence in aid of its construction."

The ambiguity is increased when we consider what at that time was the duty and liability of the Sheriff. By the law obtaining in the Recorder's Court, and in the Supreme Court until the passing of Act VI. of 1855 (and which was the law of England before the Stat. 5 & 6 Vict., c. 98), if a defendant taken in execution, was afterwards seen at large for any the shortest time even before the return of the writ, the Sheriff was liable to an action of debt for the escape, in which the plaintiff recovered the whole debt: *Hawkins v. Plomer* (f), and, per *Buller, J.*, *Bonafous v.*

(e) 5 T. R. 470.

(f) 2 W. Black. 1047.

Walker. (g) It can scarcely be supposed that it was the intention of the courts, by which the tables of fees were settled, that the Sheriff was to receive a sum of R. 1 or Rs. 2 only for performing a duty which was attended by such a liability, especially as a Sheriff in England was then entitled to poundage upon the whole debt: *Peacock v. Harris.* (h)

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As the Sheriff is the officer of the Court, and his fees are received under its authority, we have not thought it necessary to refer the case back to the Court of Small Causes that evidence of usage may be taken, but have caused an examination to be made of the records in the Sheriff's office. From these it appears that until the year 1859 the Sheriff received poundage in all cases where the defendant was arrested, and sent to prison, and no part of the debt was paid; that bills were made out to the attorney for the plaintiff at the time of the arrest, and in most cases appear to have been paid at once. About the time above mentioned the late Deputy Sheriff, Mr. Leggett, was appointed, and from that time no poundage has been claimed where the defendant has been liberated from prison without any part of the debt being paid; and where a part of the debt has been paid, the Sheriff has received poundage on the amount of the decree, but not until the payment was made, a practice which a strict construction of the word "levied" would not authorise. In the case of Captain Haines, who was arrested in August 1854, the poundage was paid by the Government on the 29th of January 1857, although the debt for which he was arrested was never paid, and he was not discharged from prison until the 9th of June 1860. We consider that no weight can be attached to the change in 1859, as opposed to the long previous practice; and that, having regard, as well to the usage and practice of the Supreme Court, as to the liability of the Sheriff at the time the old tables of fees were settled, we must construe the words used as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and this agrees with the decision in *Miller v. Abbot* at

(g) 2 T. R. 129.

(h) 1 Salk. 331.

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Madras. (i) And if the right of the Sheriff accrues upon his executing the warrant, the subsequent discharge, by the court, of the defendant from custody ought not to divest him of it. The Sheriff is bound to execute the warrant, and cannot inquire whether it is a necessary or proper proceeding; whilst it would seem to be the duty of the plaintiff to do so, as he may be required by the court to show cause why he did not proceed against the defendant's property. The liability to pay the poundage may operate as a wholesome restraint, and prevent executions against the person being issued where they would be fruitless.

We have alluded to the Stat. 5 & 6 Vic., c. 98. By that it was enacted that after the 1st of March 1843 no poundage should be allowed to Sheriff's for taking the body of any person in execution; but it was at the same time enacted, that in the case of an escape, the Sheriff should be liable only to an action on the case for damages sustained by the person at whose suit the debtor was taken or imprisoned, and should not be liable to any action of debt in consequence of such escape. This is also, by Act VIII. of 1852, the law with regard to process from the Mofussil Courts executed by the Sheriff. And by Sec. 10 of Act VI. of 1855, in the case of writs of execution issued out of the Supreme Court the Sheriff was not to be liable, in an action for escape or other breach of duty, to pay damages beyond the amount of the loss which his breach of duty had really occasioned; but this enactment was not followed by any alteration in the table of fees of the Supreme Court. This alteration in the liability of the Sheriff would not, we think, justify us in now putting a different construction upon the words used in the present table of fees from what was put upon the same words by a long course of practice in the Supreme Court; and we are of opinion that the Sheriff is entitled to recover in this suit, and, accordingly, order a verdict to be entered for the plaintiff for the amount claimed with costs, and that the defendants do pay the costs of reserving the question, and stating it for the opinion of this court, and otherwise arising thereout or connected therewith.

(i) 1 Stra. Mad. Ca. 211.

Appeal No. 104.

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Aug. 23.

BOMBAY COAST and RIVER STEAM NAVIGATION CO.

v.

RE'NE' HELEUX, Master of the Ship *Gabriel*.*Collision at Sea—Damages—Cross-suit—Admiralty Jurisdiction—
Rejection of Plaintiff—Setting aside—Costs.*

One who has sued for damages caused by a collision at sea, and out of the jurisdiction of the High Court, subjects himself to a cross-suit for damages caused by the same collision, although himself residing out of the jurisdiction of the court.

An order rejecting, for want of jurisdiction, a plaint brought under such circumstances, was set aside on appeal; and the costs of the appeal ordered to be costs in the suit.

THIS was an appeal from an order made by ARNOULD, J., rejecting a plaint for want of jurisdiction.

The suit was for damages caused to the plaintiffs' ship, the *Lord Clyde*, by a collision at sea. The plaint stated the fact of the collision, and that it was caused by the negligence of the defendant and his crew; and submitted that the defendant was subject to the jurisdiction of the court, on the ground that he had instituted a suit against the plaintiff's ship, the *Lord Clyde*, for damages caused by the same collision.

The appeal was heard before COUCH, C.J., and WESTROPP, J.

Green, for the appellant:—The defendant, by instituting a suit for damages, had subjected himself to the jurisdiction of the court; and rendered himself liable to be sued for damages alleged to be caused by the same collision. Even the power of attorney filed in the suit brought by the defendant [Admiralty Suit No. 2 of 1867] authorises Mr. Acland to sue and be sued. The rejected plaint was also presented in the Admiralty jurisdiction of the court: 1 Robinson, Adm. Ca. 387. It was competent for the plaintiffs here to proceed *in rem* against the ship, or *in personam* against the master or the owners. The ship was not in Bombay when the plaint was presented. The Admiralty jurisdiction of the court is the same as that of the Supreme Court: Original Letters Patent, Sec. 31; Amended Letters Patent, Sec. 32;

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Supreme Court Charter, Secs. 53, 54. The practice in Chancery is to stay the proceedings in a suit, until an answer in the cross-suit is filed.

The following authorities were cited:—*The Seriugapatam* (a); *The Cameo* (b); Coote's Admiralty Practice, 28; *Murray v. Vibart* (c); *Ex parte Mahomed Firoz Shah* (d); 1 Morley's Digest, Jurisdiction, 147.

PER CURIAM:—We set aside the order rejecting the plaint, and order it to be received and filed: and we order the costs of this appeal to be costs in the suit.

(a) 3 W. Robinson 41. (b) 5 Law Times, N. S. 773.
(c) 1 Phillips 521. (d) Tayl. & Bell, 74.

Aug. 19.

Original Suit No. 1507 of 1866.

LAKSHMI'BA'I, widow of Krishnanáth
Morobá..... Plaintiff.
GANPAT MOROBÁ, NA'RA'YAN MOROBÁ,
and SATYABHA'MA'BA'I, widow of Vi-
nayak Morobá Defendants.

Hindú Law—Family Property—Partition—Will—Testamentary Power—Coparcenary—Tenancy-in-Common—The words “share and share alike”—Construction—Life Estate of Widow in Immoveables—Doctrine of Mitákshará—Reunion—Joint Enjoyment.

V. and M., Hindús residing in Bombay, made a deed of partition, in 1823, of the whole of the family property, moveable and immoveable, which had come into their exclusive joint enjoyment on the death of their father. V. died in 1850, having made a Will, prepared by an English solicitor, in the English language and form, by which, after various bequests to members of the family, he disposed of the residue of his estate: one third share to his son V. absolutely; another third to his son L. absolutely; “and the remaining clear third share to my grandsons K., V., G., and N., the sons of my late son Morobá deceased, their and each of their respective heirs, executors, administrators, and assigns, share and share alike.” These residuary bequests, it was provided, were not to take effect until after the death of the testator's widow, who was appointed executrix and manager of the whole estate during her life; but the estate was divided by the award of arbitrators, in 1855, after making a provision for the widow, in substantial accordance with the directions of the will. V. and L. immediately thereafter took possession of their respective third shares of the moveable and immoveable estate; but

the third share allotted to the four sons of M., who were all still infants, remained unapportioned until 1856, when, on a suit being filed, the greater part of the *moveable* property was apportioned. The *immoveable* property allotted to them remained unapportioned; and was managed first by the widow of M., till her death in 1855; then by his eldest son, K., till his death, without male issue, in 1859; then by the next eldest son, V., till his death, without issue, in 1864; and afterwards by the elder of the two surviving sons; and the proceeds were treated throughout, as though the property was held in coparcenary by the four sons as a joint and undivided Hindú family.

In a suit brought by L., the widow of K., against K.'s surviving brothers and S., the widow of his brother V., in which L. claimed to be absolutely entitled as heir of her husband [and also as heir of her daughter, who died after her husband's death, childless and unmarried], to a fourth part of the third share of the estate allotted by the award of 1855:—

Held (1) That the words “share and share alike” occurring in the Will of V., ought not to be construed as necessarily constituting a tenancy-in-common, with all the incidents attached thereto, in English law; but that each of the four sons of M. took a separate share in the third of the testator's residuary estate; the share of each son going, on his decease, to those who would, according to Hindú (and not according to English) law, be his heirs as a separated Hindú. (2) That, with regard to the immoveable property devised by the Will and allotted by the Award to the sons of M., there never was a *union* of estate—a coparcenary—from the Commencement; and, consequently, there was no *Reunion* in the sense of the Hindú law, notwithstanding joint enjoyment and common residence; but only postponement for a time, and for purposes of convenience, of an apportionment of the estate, which was, accordingly (among other things) decreed.

THIS suit, the facts of which are fully stated in the judgment, was heard before ARNOULD, J., in a Division Court on the 20th of July, and the 5th, 8th, and 9th of August, 1867.

Pigot and Marriott for the plaintiff.

Howard for the 1st and 2nd defendants.

The Advocate General (Hon'ble L. H. Bayley) for the 3rd defendant.

Cur. adv. vult.

ARNOULD, J.:—In this case, which involves several points of Hindú law, the following appear to be the material facts:—

In the year 1823 two brothers, Vásudev Vishvanáth and Mádhavji Vishvanáth, made a deed of partition (the legal validity of which has never been, and is not now, disputed) of all the family property, moveable and immoveable, which

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had come into their exclusive joint enjoyment on the death of their father, of whom they were either the only, or the only surviving, male issue, and with whom in his lifetime they must be presumed, nothing appearing to the contrary, to have formed a joint and undivided Hindú family. Upon, or shortly after, the execution of the partition deed of 1823, the whole of the family property was in fact apportioned into two separate shares—known respectively as Vásudev's share and Mádhavji's share.

At the time of the execution of the partition deed of 1823, Mádhavji was (as until his death he continued to be) without male issue; but Vásudev had five sons, all then born, but all then infants, viz., (1) Viṭhobá, (2) Vishvanáth, (3) Rámchandra, (4) Morobá, (5) Lakshuman.

Vishvanáth, the second son of Vásudev, about the time of the execution of the partition deed of 1823, was adopted by his uncle Mádhavji, and on Mádhavji's death inherited, and has ever since enjoyed, Mádhavji's separated share. He has never made claim to, nor does he now make claim to, any interest in the separated share of his natural father, Vásudev; nor did Vásudev, in his lifetime, claim, nor have any of the sons or grandsons of Vásudev since claimed, nor do they now claim, any interest in the separated share of Mádhavji. The family house being large and commodious, all the members of the family, of both branches (Vásudev's branch and Mádhavji's branch), have continued to reside under its roof down to the present time. Vishvanáth, the adopted son of Mádhavji, though he seems frequently to have messed and worshipped in common with his natural father, Vasudev, and his natural brothers, yet has always had a separate set of rooms appropriated to him in the upper part of the family house, and the expenses of his establishment have always been defrayed out of the proceeds of his separate estate.

Rámchandra, the third son of Vásudev, died intestate and without issue, but leaving a widow, in his father's lifetime. Morobá, the fourth son, also died in the lifetime of his father, intestate, but leaving a widow, Anpúrnábáí, and four sons,

Krishṇanáth, Vináyak, Gaṇpat, and Náráyan. Gaṇpat and Náráyan, now the sole survivors of these four sons of Morobá, are respectively the first and secnd defendants in this suit : Lakshmíbái, the plaintiff, is the widow of the deceased son Krishṇanáth : Satyabhámábái, the third defendant, is the widow of the deceased son Vináyak.

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On the 23rd of December 1850 Vásudev Vishvanáth died, having, on the 14th of November 1850, made a will, in the English language and form, and prepared by an English solicitor, by which, after making various bequests to different members (principally female members) of his family, and constituting his widow, Lakshmíbái the elder (who is still living), executrix and manager of all his estate for her life, he thus disposes of the residue :—“ One clear third part or share thereof” to his son Víthobá absolutely : “ another clear third part thereof” to his son Lakshumaṇ absolutely ; “ and the remaining clear third part or share thereof, to my grandsons, the sons of my late son Morobá deceased ;—Krishṇanáth, Vináyak, Gaṇpat and Náráyan, their and each of their respective heirs, executors, administrators, and assigns, share and share alike.”

By one of the provisions of the will, the residuary devise was not to take effect until after the death of the testator’s widow, the elder Lakshmíbái ; but this having led to some ill-feeling in the family, in the year 1854, the elder Lakshmíbái, Víthobá, Lakshumaṇ, and Anpúrnábái, the widow of Morobá, and guardian, under the will, during their minority, of Morobá’s four sons, Krishṇanáth, Vináyak, Gaṇpat, and Náráyan (all then still infants), agreed that the whole of the testator’s property should be at once apportioned among the several objects of his bounty, in substantial accordance with the disposition of his will, by the award of Mr. Rimington, the solicitor of this court, and of three native gentlemen named as his co-arbitrators.

On the 17th of May 1855 Mr. Rimington and his co-arbitrators made a very fair and equitable award, by which, after securing a suitable provision for the testator’s widow, Lakshmíbái the elder, and carrying out the bequests of the

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will as to the other members of the testator's family, they divided the residuary estate into three portions (as specified in the 1st, 2nd, and 3rd schedules to their Award) between (1) Vithobá, (2) Lakshuman; (3) the four sons of Morobá, Krishnanáth, Vináyak, Gaṇpat, and Náráyan.

Vithobá and Lakshuman immediately took possession of the respective shares thus allotted to them under the Award, both of the moveable and immoveable property. Lakshuman (who has since been found a lunatic by this court) has sold all his share of the immoveable property, and apparently squandered the proceeds: Vithobá has sold only a portion of his share of the immoveable property, and that very advantageously.

The third share of the testator's residuary estate allotted, under the 3rd schedule of Mr. Rimington's Award, to the four sons of Morobá, remained under the management of their mother, Anpúrṇábá, until her death, in July 1855; nor had any actual division or apportionment even of the moveable property allotted in this 3rd schedule of the Award taken place, when, on the 10th of July 1856, a friendly suit was filed on the Equity side of the late Supreme Court, for a partition of the greater portion of the *moveable* property included in the 3rd schedule of Mr. Rimington's Award. In this suit Vináyak, Gaṇpat, and Náráyan (the two latter being represented by their uncle Vishvanáth Mádhavji as their next friend) were plaintiffs: and Krishnanáth Morobá (together with a sister, Sonábá, since deceased) was defendant.

It is admitted that, under the decree and the Master's report in this suit, an actual partition and apportionment of the great bulk of the moveable property allotted to the share of the four sons of Morobá by the 3rd schedule of Mr. Rimington's Award, has, in fact, taken place. It is also admitted that Gaṇpat and Náráyan, the first and second defendants in this suit, have enjoyed and are now enjoying their fair and equal share in the moveable property so apportioned. A certain portion of the moveable property allotted under the 3rd schedule of the Award, consisting principally of dresses

and jewellery, is still unpartitioned, and that such portion of the moveable property may now be partitioned, is part of the prayer of the plaintiff in this suit.

Of the *immoveable* property allotted under the 3rd schedule of Mr. Rimington's Award to the four sons of Morobá, no partition or apportionment was decreed, or indeed prayed for, in the Equity suit of 1856; it being expressly stated, in the last paragraph but one of the bill in that suit, that it was "*not for the benefit of the said infant plaintiffs (Ganpat and Náráyan), nor the wish of the plaintiff Vináyak Morobá, that any immediate partition should be made of the said immoveable property.*"

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Accordingly, the portion of the *immoveable* property of the testator devised to the four sons of Morobá by the residuary clause of the Will of 1850, and allotted to them by the 3rd schedule of the Award of 1855, has hitherto remained, and still is, unpartitioned. The evidence in this case, moreover, clearly shows that, at all events from the date of the Award of 1855, this portion of the immoveable property has been managed and enjoyed first by the widow, and, after her death, by the sons of Morobá, precisely in the same way as it would have been managed and enjoyed, had it vested in the four sons of Morobá in coparcenary, as constituting among themselves a joint and undivided Hindú family.

The widow Anpúrṇábái managed till her death, in July 1855; then Krishṇáth, the eldest son of Morobá, till his death, intestate and without male issue, in 1859; then Vináyak, the next eldest, till his death, intestate and without issue, in 1864; and from that time to the present the property has been, and now is, managed by Ganpat, the elder of the two surviving sons of Morobá, who are respectively the first and second defendants in this suit. Dwelling in the same portion of the family house, messing together and worshipping in common, the sons of Morobá are proved, ever since the Award of 1855, if not, indeed, from an earlier date, to have paid their joint family expenses out of the rents and proceeds of this unpartitioned share of the immoveable property, devised to them by the Will, and

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allotted to them under the Award. Those rents and proceeds are shown to have formed a common stock or fund, out of which, after the joint family expenses were defrayed, the surplus was laid by, on the joint family account, by the managing elder brother for the time being. In short, the evidence clearly shows a joint undivided enjoyment as a matter of fact, by these four sons of Morobá, of their unpartitioned one-third share of the immoveable property devised to them by the Will and allotted to them by the Award—an enjoyment extending from the date of the Award, if not from an earlier period, down to the present time. Whether this joint enjoyment is evidence of *reunion*, according to Hindú law, among the sons of Morobá, or whether it was a mere matter of convenient arrangement, and, therefore, not of force to alter or disturb legally vested rights, is one of the questions in this case; but of the fact of such joint enjoyment there can, on the evidence, be no doubt.

In February 1866, Lakshmíbáí, the plaintiff in the suit, the widow of Krishṇanáth (the elder of the four sons of Morobá), caused her solicitors to send a notice to Ganpat and Náráyan, the two surviving sons of Morobá, to insist on an immediate partition of the yet unpartitioned portion of the moveable property, ornaments, clothing, &c., and the appropriation to her of her late husband's share therein. To this the solicitors of Ganpat and Náráyan replied, that the four brothers, both before and after the date of Mr. Rimington's award, constituted a joint and undivided family according to Hindú law, and that, therefore, she (Lakshmíbáí) as the sonless widow of one of the brothers, was entitled to no share at all in the family property, but to a mere maintenance.

Ever since her marriage with Krishṇanáth down to the time, or about the time, of her sending the notice of February 1866, Lakshmíbáí had continued to reside in the family house. She then left it, and in October 1866 filed her plaint in the present suit. In this plaint she makes the case that her late husband Krishṇanáth, under his grandfather's will, was entitled to a separate fourth share in that portion of the testator's property which was devised to the four sons

of Morobá, and that Krishṇanáth never brought such his separate one-fourth share into the family again, although, for convenience sake, the parties to the Equity suit of 1856 agreed not to press for an actual division of the immoveable, and of certain portions of the moveable, property. She, accordingly, prays that she may be declared absolutely entitled, as heir of her late husband, to a fourth part of the property set forth in the 3rd schedule of the Award of 1855 ; that a partition into four equal shares be forthwith made of the said property for the benefit of the parties entitled thereto ; that the Commissioner of this court be directed to take accounts of the management of the property since the death of Krishṇanáth, &c., to frame a scheme for the partition of the said premises, and to report whether it would be necessary or advisable to sell the whole, or any and what partition thereof.

On the 30th of January 1867, Ganpat and Náráyan, and on the 22nd of February 1867, Satyabhámábái, respectively filed their written statements.

Ganpat and Náráyan set up the case that the plaintiff's late husband, Krishṇanáth, died a member of an undivided Hindú family ; that on his death, without male issue, his share merged in the family estate ; that the plaintiff, as his widow, is only entitled to maintenance, and not to the partition or other relief for which she prays.

Satyabhámábái, as the childless widow of Vináyak, claims to be entitled to an equal fourth part of the immoveable, and of the undivided portion of the moveable, property devised to the four sons of Morobá by the Will of 1850, and allotted by the Award of 1855 ; she prays that a partition may be made, and as to the accounts, submits that they should be taken, if at all, not from the death of Krishṇanáth only, but from that of Anpúrnábái.

Such being the material facts of the case, many legal points were raised.

It was first contended by Mr. Howard, for the first and second defendants, that, though he admitted that the partition

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of 1823 was valid in law, and had always been acquiesced in and acted on, in fact—yet, as the property, the subject of that partition, was ancestral, it could not be alienated by gift or disposed of by will, in the same manner as self-acquired property.

On this point it seems sufficient to refer to the decision of the Privy Council in the *Rajah of Shivagunga's Case* (a), in which, after an elaborate review of all the authorities, the position was established, that “when property belonging in common to a united Hindú family has been divided, the divided shares go in the general course of descent of separate property.”

It certainly would seem fairly to follow from this decision that the same power of alienation by gift, or disposal by will, must exist in the case of divided ancestral property, as in the case of other separate property; and this position has accordingly, been affirmed in a recent well-considered judgment of the High Court of Bombay in the exercise of its appellate jurisdiction, delivered by Mr. Justice Westropp, on the 13th of October 1866 : *Narottam Jagjivan v. Narsandas Harikisandas*. (b)

Whether, in the case even of separate property, the right of disposition by will is strictly co-extensive among Hindús with the right of alienation *inter vivos*, is a point that may still, perhaps, be regarded as open to some question. That it is thus co-extensive, was apparently affirmed in the elaborate and well-considered judgment delivered in the High Court of Madras by Chief Justice Scotland in April 1863 : *Vallinayagam Pillai v. Pachche and others*. (c) Mr. Justice Holloway, however, in January 1866, expressed himself to the effect that the doctrine that a man may devise whatever he may give has never yet been established by judicial decision. (d)

On this point, however, it is not necessary in the present case to express any opinion; for here the testator, by the will

(a) 9 Moo. Ind. App., 609.

(b) 3 Bom. H. C. Rep., A. C. J., 6.

(c) 1 Mad. H. C. Rep., 326; and see especially pp. 337 and 339.

(d) 3 Mad. H. C. Rep., 55.

of 1850, though undoubtedly dealing with his share of the property partitioned in 1823, as separate and not as joint family property, has not, as it appears to me, at all exceeded the powers which, according to a long current of uncontested decisions, are by law vested in a Hindú, when disposing by will of his separate property. He has excluded none who, by the ordinary course of descent, would have had any right to inherit, and he has divided his residuary estate into three equal shares—giving one of such shares to each of his two then surviving sons, and the remaining third in equal portions to the four sons of the only one amongst his own deceased sons who left male issue. His other deceased son, Rámchandra, left no issue, only a widow, who is equitably provided for in the Will; and his other surviving son, Vishvanáth, had been taken out of his, the testator's, branch of the family, by virtue of his adoption by the testator's brother, about the time of the partition of 1823.

There has been a recent decision of the High Court of Madras, that in the absence of all proof of fraud, or undue advantage or gross inequality (all of which are absent in the present case), infants are bound by an agreement for division in which they were represented by their mother as guardian: *Nallappa Reddi v. Balammál and others.* (e) On the authority of this case it might be fairly contended that the first and second defendants in the present suit were bound by the award of 1855. But even apart from the award and the Equity suit of 1856, under the decree and report in which the first and second defendants (as the evidence clearly shows) have actually taken an apportionment of the larger part of the moveable property allotted under the 3rd schedule of the Award of 1855—apart, I say, from all consideration of these matters, I have been unable, after giving the best attention in my power to the arguments adduced by Mr. Howard on this part of the case, to understand how it can be seriously contended that this testator had not the legal right so to dispose of his share of the property, divided between him and his brother Mádhavji by the admittedly

(e) 2 Mad. H. C. Rep., 182; 16th July 1864.

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valid partition deed of 1823, as he did, in fact, dispose of it by the will of 1850. It appears to me, upon the best consideration I have been able to give to the case, that he clearly had such testamentary disposing power.

The next question is assuming him to have had such disposing power, what estate was vested in the four sons of Morobá by the clause in the will devising the residuary third-share to them. For the plaintiff it was contended that the will (though made by a Hindú), being in the English language and form, the words "*share and share alike*" must have the same technical sense given to them, as they undoubtedly have acquired in English wills; and that the clause must, accordingly, be held to have vested in the four sons of Morobá a tenancy-in-common in fee, according to, and with all the incidents annexed to it by, English law: *Jarman on Wills*, Vol. II., p. 211.

In support of this proposition reference was made to the case of *Morton v. Lee* (f), and to the case of *Gangabai v. Thavur Moolla*, decided by the late Chief Justice, on the Equity Side of the late Supreme Court. (g) With regard to the case in the Privy Council, it may be sufficient to observe, that though the marginal note of the Reporter affirms the proposition contended for positively, the judgment of the Privy Council by no means goes to the same extent, and does not warrant a reference to their Lordship's decision, as clearly or categorically establishing the principle of construction in support of which it has been, more than once, cited in this court. The decision in *Gangabai v. Thavur Moolla* has, in my opinion, been a good deal misunderstood. In that case a lady belonging to the Khojá community had made a will in the English language and form, disposing of a part of her property in *charity*. Those who opposed the will contended that the word "*charity*" should be read "*dharm*," and that parol evidence should be admitted to show that "*dharm*" was the word used by the testatrix in giving instructions for her Will; and they urged this view,

(f) 14 Moo. P. C. Ca. 211. (g) 1 Bom. H. C. Rep. 71.

in order to set aside the disposition to "*charity*" as a void bequest, on the authority of certain cases in which the late Supreme Court and this Court had refused to carry out bequests to *dharma* (*h*). The late Chief Justice, *ut res magis valeat quam pereat*, rejected the application to let in parol evidence, and upheld the Will, on the ground expressed in the following passage of his judgment:—"The testatrix was not obliged to make her Will in English, but having selected that language to convey her intentions under the safeguard of an English solicitor, the Will must, after thirteen years, and in the absence of any allegation of deception or fraud, be now *taken to have intended what is clearly expressed in it.*" (*i*)

Of the equity and justice of this decision there can be no doubt; and it is based on the plain and intelligible ground, that a testator must be taken to have intended by his Will what is clearly expressed in it.

It does not appear to me that either of these cases supports the proposition that a Native making a will in the English language and form, through the medium of an English solicitor, is necessarily to be taken as intending to convey by the expressions used in the Will all the technical meanings which in a long course of judicial construction have been attached to them in the English courts, but of which a Native testator may, most reasonably and fairly, be presumed to have been wholly ignorant.

The very reasons, for instance, assigned by Mr. Jarman for the technical construction put by English Judges on such expressions as "*share and share alike*" in English wills, show that the rule of construction contended for is one that should not be adopted by Indian tribunals, in suits between Hindus. "The preceding cases," says Mr. Jarman, "evince the anxiety of later [English] Judges to give effect to the slightest expressions affording an argument in favour of a tenancy in common—an anxiety which has been dictated by

(*h*) As to these cases see note of the Reporter in 1 Bom. H. C. Rep., 274.

(*i*) *Ibid.*, p. 75.

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the conviction that this species of interest is better adapted to answer the exigencies of families than joint tenancy :— Jarman on Wills, Vol. II., p. 211.

This ground of decision is not applicable to suits between Hindús in India, where, as is well known, the unit of proprietorship is, and for ages has been, not the individual, but the family; and where it is incumbent on the courts, by a long-settled rule, always to presume, where Hindús are the litigating parties, in favour of a family being undivided, till the contrary is proved.

For these reasons it appears to me that in a suit like the present, in which all the parties are Hindús, I ought not to construe the words "*share and share alike*," occurring in this Will, as necessarily constituting a tenancy in common, *with all the incidents attached thereto in English law*. It seems to me that the true rule of construction is to take all the words as they stand in this clause of the Will in their plain and natural sense; and so taking them, I am clearly of opinion that they give to each of the four sons of Morobá a separate share in the third of the testator's residuary estate, the share of each son going on his decease to those who would, *according to Hindú (and not according to English) law*, be his heirs as a separated Hindú.

Now the plaintiff, Lakshmíbáí, and the third defendant, Satybhámábáí, being respectively (according to the above construction) the widows of Krishnanáth and Vináyak, separated Hindús who died without male issue, are respectively entitled by Hindú law, as their heirs, to the fourth-share of their respective husbands in the moveable and immoveable property devised to the four sons of Morobá by the Will of the testator, and allotted to them under the 3rd schedule of the Award of 1855. Each of these two widows, as to their respective late husbands' undivided fourth-share of the *moveables*, is entitled *absolutely*: as to the undivided fourth-share of the *immoveables*, each is entitled to an *estate for life only*, without power of alienation, except for certain very special and stringent purposes of religion or necessity.

That the widow of a separated and sonless Hindú, in all parts of India where the *Mitákshará* law prevails (and this includes the Bombay Presidency), takes only a life estate in immoveable property, *which goes on her decease to those who at her decease are the heirs of her husband*, is a position too firmly established to admit of doubt.

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An ingenious attempt, indeed, has recently been made by Messrs. West and Bühler, in their very learned work on the Hindú Law of Inheritance (pp. lxiv. to lxvii. of the Introduction), to show that immoveable property thus inherited by a Hindú widow is *stridhan*, and goes on the widow's death to her heirs, not to her husband's. But the current of opposing authority is far too strong to be resisted ; and the true doctrine must be taken to be, that, wherever in India the *Mitákshará* law prevails, the widow of a sonless and separated Hindú takes, as his heir, his immoveable estate for her life only, and that on her death those succeed her who would have been her husband's heirs in her default ; in other words, her estate is an estate interposed for life between the last absolute proprietor and his next heirs. See the doctrine very clearly laid down in Colebrooke's Digest, Book V., Ch. viii., Sec. 1 (j), *Doe d. Kullammál v. Kuppu Pillai* (k), *P. Bachiraju v. V. Venkatappadu* (l), *Devkúvarbá'i's Case* (m), *Jamiyatram et al. v. Bái Jamná*. (n) The decisions of the High Court of Calcutta are numerous o the same effect as to those parts of Bengal where the *Mitákshará* law prevails. In fact, the doctrine must now be regarded as finally and conclusively established.

Such then being, in my opinion, the rights of the plaintiff and the third defendant, under the devise in this Will to the four sons of Morobá, it remains to consider whether their rights are affected by the circumstances : (1) that as to the immoveable property devised to these four sons by the Will, there has been no *partition of lands by metes and bounds* ;

(j) Madras Edn. of 1865, pp. 531-532.

(k) 1 Mad. H. C. Rep., 85. (l) 2 Mad. H. C. Rep., 402.

(m) 1 Bom. H. C. Rep., 130. (n) 2 Bom. H. C. Rep., 11.

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Now that there may be, in Hindú law, a partition of *estate* without a partition of *lands*, a division in *title* without a division in *enjoyment*, is a clear and elementary principle. See *Vyavahár Mayúkha*, Chap. IV., Sec. 3, "Partition of Heritage;" a very instructive case in the High Court of Calcutta, *Mussamut Josoda Koonwur v. Gourie Bijonath Sohac Sing* (o); and a recent case in the Privy Council, *Appoovier v. Ramasubba Aiyan and others*, decided on the 17th of November 1866 (p), and cited by Sir B. Peacock, C.J., as the basis of his decision in *Lalla Mohabeer Pershad and others v. Mussamut Kundun Koowar*. (q)

It appears, indeed, to have been recently ruled by the High Court of the North-Western Provinces, that in order to entitle the widow of a deceased brother to succeed in her claim for his separate share, there must have been a regular partition and apportionment of lands, and not simply a division of estate, but the High Court of Calcutta, before which this ruling was cited, has in terms dissented from it: *Lalla Sreepershad v. Mussamut Akoonjoo Koonwar and others* (r); and in my opinion rightly, for I cannot, as at present advised, see on what ground of principle or precedent the ruling referred to rests. I also find that the widow's right to enforce a partition, where there has been no apportionment of lands in fact, has been upheld by the High Court of Bombay in the exercise of its appellate jurisdiction: *Ram Joshi v. Laxmibai kom M. S. Joshi*. (s)

(o) 6 Calc. W. Rep., Civ. R. 139, decided on the 4th of August 1866.

(p) 8 Calc. W. Rep., P. C., 1.

(q) 8 Calc. W. Rep., Civ. R. 116; 29th June 1867.

(r) 7 Calc. W. Rep., Civ. R. 488.

(s) 1 Bom. H. C. Rep. 189.

Then comes the question whether there is in the present case evidence of anything that amounts, in Hindú law, to a reunion, among the four sons of Morobá as to their residuary third-share in the immoveable property devised to them by the Will of 1850 and allotted by the Award of 1855.

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The evidence, indeed, shows that they have throughout dealt with this their share in the said immoveable property, just as though it were held by them in coparcenary, as a joint and undivided Hindú family : its proceeds have been appropriated to the common family use ; the common family expenses have been paid out of such proceeds ; and the surplus has been set apart as a common family fund.

The question is whether this is evidence of anything more than an arrangement among themselves, by which a partition *in fact*, *an apportionment of lands in severalty*, has been postponed from motives of convenience ; or whether it is really to be taken as evidence of a *Reunion*.

The doctrine of reunion in Hindú law will be found treated of in 1 Strange, H. L., pp. 234, 235 ; *Mitákshará*, Chap. II., Sec. ix., Cl. 2 *et seq.* ; *Vyavahár Mayúkha*, Chap. IV., Sec. ix., Cl. 1 *et seq.* The decisions on the point have not been numerous ; I have only been able to meet with three : *Tara Chand Ghose v. Pudum Lochun Ghose and others* (*t*), *Kuta Bully Virzya v. Kuta Chudappavuthamulu* (*u*), and *Vishvanáth Gangádhar v. Krishnáji Ganesh and others* (*v*).

In the Calcutta case, there had been first a state of union as a joint and undivided Hindú family ; then a state of partition in fact—that is, apportionment of lands, as well as division in estate ; thirdly, residence in common and enjoyment in common, after such partition, by a certain branch of the family. The Court, sitting as it was in special appeal, came to no decision on the facts, but remanded the case to the lower court, for a finding whether the facts proved amounted to a reunion upon the principles laid down in the

(*t*) 5 Calc. W. Rep., Civ. R., 249.

(*u*) 2 Mad. H. C. Rep., 235.

(*v*) 3 Bom. H. C. Rep. A.C.J., 69.

1867. LAKSHMI'BA'T v. GANPAT MOROBÁ' et al. judgment of the High Court. What the finding of the lower court was on the facts is not mentioned in the Report, and, indeed, from the nature of the remand, it is not probable that the case ever came again before the High Court.

In the Madras case, there had been, 1st, union ; 2nd, division of estate and no partition of lands ; 3rd, clear proof of subsequent mixture of property (a joint enjoyment), and residence in common. The lower court having found that the facts proved did not show reunion, the High Court of Madras, in regular appeal, (one of the members of the court being Mr. Justice Holloway), refused to disturb the finding of the lower court.

In the Bombay case, the principle is laid down that reunion must be made by the parties, or some of them, who made the separation.

The conclusions I draw from these authorities are : (1) That in order to constitute Re-union, there must, as indeed the very word implies, have been a previous state of *union* ; (2) That, in the absence of partition in fact, *i.e.*, apportionment of lands, as well as division of estate, it would be very difficult, to say the least of it, to establish a conclusive case of reunion as a matter of evidence ; (3) That the reunion must be effected by the parties, or some of them, who have made the partition.

Now in the view I take of the present case all these elements are wanting : that there has been no partition in fact—no several apportionment of lands—is clear ; and, in my opinion, it is no less clear, that as regards the immoveable property devised by the will of the testator, and allotted by the Award of 1855 to the four sons of Morobá—a union of estate—a coparcenary—the status of joint and undivided Hindú family—never did exist *from the commencement*. Their interest in this third-share of the testator's immoveable property was derived from the Will and created by the Will, and under the Will their estate in that immoveable property, from its inception, was not joint and undivided, but separate. Under the Will all the four sons of Morobá did not take in coparce-

nary, but each one of the four took separately a separate fourth.

It appears to me, therefore, that the present is a case in which the evidence that has been adduced of joint enjoyment and common residence, subsequent to the creation of the estate, does not amount to evidence of reunion in Hindú law; but simply to evidence of postponement for a time, and for purposes of convenience, of a partition and apportionment of the immoveable property, in which, under the Will, they had a divided estate. As such it cannot affect legally vested rights, or alter the division of estate created among the four sons of Morobá by the residuary clause of the Will of 1850.

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These being the conclusions at which I have arrived, I pass a Decree : 1. Declaring the plaintiff, Lakshmíbáí, as heir, according to Hindú law, of her deceased husband, Krishnanáth Morobá, entitled *absolutely* to his one-fourth share in the yet unpartitioned portion of the *moveable* property allotted under the third schedule of the Award of 1855, and to an estate for her life, according to Hindú law, with remainder to those who at her decease may be the heirs of her said deceased husband, in his unapportioned one-fourth share of the *immoveable* property allotted under the said third schedule of the said Award.

2. A similar declaration (*mutatis mutandis*) as to the rights of Satyabhámábáí, the third defendant, as heir, according to Hindú law, of her deceased husband, Vináyak Morobá.

3. Direction that it be referred to the Commissioner, under Sec. 181 of the Code of Civil Procedure, to take accounts as prayed; such accounts to be taken from the death of Anpúrnábáí, the widow of Morobá Vásudevji.

4. Direction to the Commissioner, if necessary, to frame a scheme for a partition, and to report whether the whole, or what, if any, portion, of the said immoveable property should be sold, &c.

5. Direction that, with a view to the better taking of the said account, &c., as above, Satyabhámábáí, the third de-

1867. LAKSHMI' BA'¹ v. fendant, do further take out administration to the estate and effects of her deceased husband, Vinayak Morobá.

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6. Each of the parties to the suit to bear his or her own costs respectively.

Of course, if the parties to the suit, acquiescing in the principles of this decision, can agree to some equitable arrangement, by which the expense and delay of going before the Commissioner may be avoided, it will be much to their advantage to do so; if not, the above directions must be carried out.

10 Oct. After the delivery of the above judgment, *Mr. Pigot* raised an objection that no notice had been taken by the Court of the point that Lakshmíbáí claimed as heir, not only to her husband, but also to her daughter Devkúvarbáí, who died after her husband's death childless and unmarried. The point came on for argument to-day, when, having heard *Mr. Pigot* and *Mr. Marriott*, counsel for Lakshmíbáí, I came to the conclusion, without calling on the other side, that, even assuming that Lakshmíbáí could be said to inherit at all from her predeceased daughter, which, in my opinion, she could not, yet any estate she so took could not alter the quantity or quality of the estate that had devolved upon her from her deceased husband; and, therefore, no ground was shown for altering the Minutes of the Decree as originally framed.

Appeal Suit No. 92 of 1867.

PENINSULAR AND ORIENTAL STEAM NAVI-

GATION COMPANY *Appellants.*MA'NIKJI NASARVA'NJI PA'DSHA' *Respondent.**Bill of Lading—Insufficiency of Package—Mercantile Usage—Custom—Evidence of Custom.*

The defendants, carriers between Hongkong and Bombay, by a condition annexed to their bill of lading, stipulated that they should not be responsible for damage to goods arising from insufficiency of package.

The plaintiff shipped certain goods in the defendants' steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hongkong to Bombay.

On their being landed in Bombay it was found that packages were more or less broken, and that the contents were in some instances injured, and had to a small extent escaped from the packages.

In an action brought to recover damages in respect of such injury, it was held—

That evidence of mercantile usage or of custom would be admissible to show that the words *insufficiency of package* should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade.

Held, also that evidence of these packages being ordinary China packages, and of such packages having been always carried by the defendants without objection, was not sufficient, in the absence of proof of negligence, to fix the defendants with liability for damage done to them, there being no proof that it had been the practice either of the defendants, or any other shipowners protected by a similar clause in their bill of lading, to make compensation for injury to goods contained in such packages.

THIS was an appeal from the decision of Arnould, J., delivered in the First Division Court on the 7th of January 1867, in Suit No. 802 of 1866.

The plaintiff in his plaint claimed Rs. 5,120 as damages for breach of contract, *for that* the defendants, on the 27th of February 1866, in consideration of freight in that behalf paid to them, promised to carry safely certain goods of the plaintiff, consisting of seven boxes of glass bangles, twenty boxes of yellow stone, and thirty boxes of brass leaf, shipped at Hongkong, in good order and well conditioned, in and upon a certain ship of the defendant named the "Behar," from Hongkong to Bombay, and to deliver the same, in like good order and well-conditioned, to the plaintiff or his assigns at Bombay.

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Breach—that the defendants dealt so carelessly and negligently in and about the carrying of the same, that when they arrived in Bombay they were damaged and in an unmerchantable condition ; whereupon the plaintiff, as he lawfully might, refused to receive the same when tendered to him by the defendants.

The defendants in their written statement relied upon a condition in their bill of lading, which was as follows:—“The Company are not to be responsible for leakage or breakage or other consequences arising from the insufficiency of package.”

By the bill of lading it was also stipulated that the company were to be at liberty, at any time during the voyage, to tranship the goods into any other steamer of the defendants, and for that purpose to land and store the same at the company's expense, but at the merchant's risk. It was admitted by the defendants that the goods were shipped in good order and condition. And, from the evidence given at the trial, it appeared that they arrived in Bombay in such a state that a wholesale merchant would be justified in refusing to receive them, all of the packages being more or less broken. The contents also were in some instances injured, and, in others, had partially but not extensively escaped, and lay on the floor of the warehouse belonging to the Customs Department, in which the goods were stored on arrival in Bombay. The boxes of bangles contained each about three thousand glass bangles, sewed on cards, four pairs of bangles being on each card. Those boxes were composed of wood-work three-eighths of an inch in thickness. They were about two feet in length, eighteen inches in width, and eighteen inches to two feet in depth, weighed about 170 lbs. each, and were made of China pine fastened together with wooden pegs ; they were also fastened with cross pieces of the same wood, and the whole was covered with China matting, tied round with pieces of split rattan. Each box of yellow stone weighed about 130 lbs. The yellow stone and brass leaf were in boxes, about fifteen inches long, eight to ten inches in width, and of like depth, the woodwork being

half an inch thick. They were wrapped in matting in the same manner as the boxes of bangles. The packages of the three kinds of goods mentioned were proved to be such as are in ordinary use for conveying such goods respectively from China to Bombay—in fact the only species of packages in which the trade is carried on. In ordinary voyages the evidence for the defence showed that of such boxes from twenty-five to thirty per cent. usually arrived in a broken and damaged state, and that they were altogether unfit to bear any extra hardship, such as would be occasioned by transhipment. One witness, the Chief Assistant in the Landing and Shipping Company, deposed that the woodwork was so slight, and the contents of the boxes so heavy, the woodwork frequently gave way in the slings.

Transhipment was not an ordinary incident of the voyage, and had not, it was stated by one of the defendants' employés, occurred more than three times altogether in the three preceding years; but in this case the goods had been transhipped at Galle. Evidence was tendered by the defendants to show that they had never paid for or compromised any such claim as the present. This evidence, being objected to by the plaintiff's counsel, was rejected. No express negligence on the part of the defendants was proved.

The issues framed were—

I. Whether the defendants dealt carelessly and negligently in and about carrying the said goods, as in the plaint alleged.

II. Whether the said goods arrived in Bombay in an unmerchantable condition, as in the plaint alleged.

III. Whether the damage, if any, to the said goods arose from the bad and insufficient package thereof, and not from the fault of the defendants, as in the written statement alleged.

McCulloch and Hayllar for the plaintiff.

Howard and Branson for the defendants.

Cur. adv. vult.

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1867. ARNOULD, J. (after stating the pleadings and issues), continued :—It was admitted by the defendants that the goods, described in the bill of lading as “seven boxes of glass bangles, twenty boxes of yellow stone, and thirty boxes of brass leaf,” were “shipped in good order and well-conditioned” at Hongkong; and the evidence, in my judgment, clearly shows that the said boxes with their contents did not arrive in Bombay “in like good order and well-conditioned.”

Under these circumstances it is clear that the defendants, as carriers, would be liable to *some* extent in damages to the plaintiff, unless they could show that there was anything in the bill of lading, which in this case constituted the contract between the plaintiff, as merchant, and the company, as ship-owners, to exempt them from liability.

The general rule of law on this point is too clear, and has been too long established, to admit of any doubt, and is thus laid down in *Abbott on Shipping*, Part IV., Chap. VI., p. 286 (Ed. of 1856):—“In considering whether shipowners or other carriers are chargeable with any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, the provisions of statutes, or the particular contract of the parties, afford an excuse for the non-performance of the contract.” The defendants contended that the bill of lading, which in this case constitutes the particular contract between themselves as carriers and the plaintiff as shipper, *did* afford an excuse for the non-performance of their contract, to whatever extent such non-performance might be proved.

They relied on the following stipulation, forming one of the printed conditions to which the bill of lading on the face of it was declared to be subject :—“The Company are not to be responsible for leakage, or breakage, or other consequences arising from insufficiency of package;” and they contended that their failure, if any, to deliver the plaintiff’s boxes of bangles, yellow stone, and brass leaf in Bombay “in

the like good order and as well-conditioned" as when they were shipped at Hongkong, arose from the "insufficiency of the package," and not from any default of the company as carriers.

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The proof as to this part of the case was that the boxes of glass bangles contained each about three thousand glass bangles: and that the thickness of the woodwork of these boxes was three-eighths of an inch; the wood was of China pine, fastened together with wooden pegs, not with iron nails, and further secured with cross-pieces of the same wood, and with an outer wrappago of China matting tied round with pieces of split rattan. The boxes of "yellow stone" and "brass leaf" were packed in the same way, the only difference being that the woodwork of these boxes was somewhat thicker, being half an inch instead of three-eighths of an inch.

Now the result of the whole evidence as to the sufficiency of these packages, in my judgment, amounts to this—that they were sufficient, according to the course and usage of the China trade (that is, of the known and established course of the import navigation between China and Bombay), to withstand the ordinary wear and tear of the voyage from China to Bombay, apart from accident. They were the ordinary China packages for goods of the nature and weight of those forming the consignment out of which this suit has arisen. In the great majority of instances, goods of the same weight and quality as those of the plaintiff's in the present case, packed in cases of precisely the same strength and description, arrive in Bombay in the like good order and condition as they were shipped in China. Even Mr. Parker, the Acting Chief Assistant to the Agent of the P. and O. Company in Bombay, admitted that, though European packages were much stronger than China packages, the percentage of claims preferred against the company for damage on voyages from Europe to Bombay was considerably higher than on voyages from China to Bombay; the reason probably being that transhipment is a necessary incident of the voyage from Europe to Bombay (in the

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company's steamers), whereas it is only an occasional, and, in fact, a very infrequent incident of the voyage from China to Bombay, not having occurred, said Mr. Parker, above three times in the course of the last three years.

On the present voyage transhipment and storage *did* take place at Galle, and it may very reasonably be conjectured that the damage done to the plaintiff's packages was mainly caused in that process; but of this no positive proof was given, and in the absence of such positive proof the company cannot, of course, rely on the clause of their bill of lading which gives liberty to the company to tranship and store, such transhipment and storage being "at the merchant's risk." Indeed the defendants' counsel very properly did not attempt to contend that the company could avail themselves, as a defence to the present suit, of this transhipment and storage clause, and they rested their defence, as to the general question of the company's liability (irrespective of all questions as to amount of damages,) upon the clause as to "sufficiency of package."

I am of opinion, upon the evidence, that these packages are not shown to have been insufficient within the true meaning of the condition annexed to this bill of lading. The evidence, as already intimated, shows, in my judgment, as a matter of fact, that these packages were sufficient according to the usage and known course of the import navigation trade from China to Bombay; they were up to the average strength of China packages for goods of such weight and description as those shipped by the plaintiff for this voyage.

This being my conclusion from the evidence as to the matter of fact, I am of opinion, in point of law, that as against the company, under this bill of lading, they must be taken as having been sufficient packages. The company, which has been for some years engaged in this import carrying trade, from China to Bombay, and has latterly had by far the largest share of it, must be taken to have been fully cognisant of the general nature of China packages, and cannot, in reason and good sense, be taken to mean, by the con-

dition on which they now rely, that they would not be answerable for any loss arising from damage done, in the course of a voyage from China to Bombay, to China packages which are up to the average standard of sufficiency usual in the import trade from China to Bombay. If they wish to protect themselves against the consequences of such damages to China packages as has taken place in the present instance, they should make their conditions of exemption more precise and specific. They should distinctly stipulate, for instance, either in their bills of lading, or in shipping orders to be issued by them at the China ports, that they will not be responsible for consequences arising from damage to China packages, except in cases where the woodwork of such packages is of a certain specified thickness for a certain specified weight of contents; where the woodwork is fastened together with iron nails, not with wooden pegs; where the packages are iron-clamped or iron-hooped, &c., &c. That the company know perfectly well how to limit their liability, by specific conditions as to the strength and description of packages for damage to which alone they mean to be responsible, is clearly shown by exhibit H—a printed form of shipping order issued by the company to those who ship goods by their steamers from Bombay both to Europe and to China.

Mr. Howard contended that the words "insufficiency of the package" were too clear to be construed with reference to any usage or course of trade, and must be taken in an absolute sense. But how is the Court to form a judgment as to what constitutes "insufficiency of package" in the absolute sense. In one point of view, every package which has not come safely through the wear and tear of the voyage on and for which it was shipped, which arrives damaged at its port of destination, without express proof of negligence on the part of the shipowners, may be said to be insufficient. But it can hardly be seriously contended that the words "insufficiency of package" are to be taken in this sense; for, if so, then the P. and O. Company, under this form of bill of lading, could never be held responsible for loss arising

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 P. & O. S. negligence : a proposition which, if established, would pro-
 N. Co. bably soon have the result of preventing all prudent mer-
 v. chants engaged in the Bombay and China trade from ship-
 MA'NIKJI ping by the company's steamers.
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The fact is there can be no *absolute* standard of sufficiency and insufficiency of the kind contended for. The good sense of the mercantile world, which in this respect has been first followed and then sanctioned by the rules of mercantile law, shows that in all mercantile, and especially maritime, contracts, reference must be had to the established course and usages of the trade, that is, of the line of export and import navigation in respect of which the contract has been entered into.

And this is so not only in cases where the terms of the contract are technical, obscure, and ambiguous ; it is so also where the words, in their ordinary, or dictionary, sense, are unambiguous and plain. Whenever, without reference to trade usage, the mere terms employed would not be a complete expression of the mind and intention of *both* the contracting parties, evidence of usage or course of trade, if not repugnant to the express terms of the instrument, is always admitted to show what the true nature of the contract, as mutually understood by the parties, really was,—evidence of usage, or course of trade, in such cases not being adduced to vary or contradict the plain words of the instrument, but merely to introduce matter which, though it must be taken to have been in the mind of both the contracting parties, is not expressed in terms on the face of the instrument (see the cases and authorities collected in Arnould on Insurance, 2nd Ed., Vol. 1, pp. 69, 70, and 71).

To apply these principles to the present case. Here the ordinary sense, the *dictionary* sense, of the words "insufficiency of package" is clear enough ; but the question is, what do those words mean in a bill of lading forming the contract between a merchant and shipowner on the import carrying trade from China to Bombay ? Would the merchant, from the language of this stipulation, have fair and reasonable

notice that packages up to the ordinary average of strength and sufficiency in the import trade from China to Bombay, could in any event be treated by the shipowner, by virtue of this stipulation, as "insufficient packages," within the meaning of the clause ?

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It appears to me that the merchant shipper under this bill of lading could not have such notice, but that he would, on the contrary, have a clear right to consider under this stipulation that if his packages were up to the usual standard of strength and sufficiency in the trade between China and Bombay, for the transport on that voyage of goods of the weight and description actually packed in them (which the evidence adduced at the hearing proves to my satisfaction that in the present case they were), then they were not "insufficient" packages according to the true meaning of this condition. As to the shipowners (the company), it is clear that the condition having been inserted by them in limitation of their common law liability as carriers, its words must, according to the usual rules of legal construction, be taken *contra proferentes*. It was in the power of the company to have made the meaning of this clause clear and explicit beyond all chance of mistake; as they have not done so, but left its meaning to some extent equivocal, that interpretation must be adopted which, while strictly consistent with, and merely explanatory of the language of the clause, is the most favorable for the merchant shipper.

The parties to this contract cannot, in my view, according to the rules that govern the construction of mercantile instruments, be taken as meaning that packages sufficient, according to the usual course of trade, for the ordinary wear and tear of a voyage from China to Bombay, were "insufficient packages" within the meaning of this stipulation.

The conclusion I come to, therefore, on this part of the case is, that the plaintiff has a cause of action, in respect of loss sustained by reason of the damage done to his packages in the course of their transit in the defendants' steamers from Hongkong to Bombay. * * * * *

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The decree, therefore, will be for the plaintiff for Rs. 5,120 damages with costs ; and interest at six per cent. on the amount of the judgment till payment.

From this decree the defendants appealed.

The appeal was heard before COUCH, C.J., and WESTROPP, J., on March 14 and 15.

Howard and Branson for the appellants.

McCulloch and Hayllar for the respondent.

Cur. adv. vult.

April 8. COUCH, C.J.:—There are two questions to be determined in this case. The first is, whether the packages were insufficient within the meaning of the contract between the parties ; and the second, whether the damage which they sustained was occasioned by that insufficiency.

After the admission made by the defendants, that the goods were shipped in good order and condition, it is necessary for them to show that the packages were insufficient, and that the damage was occasioned thereby.

I may observe that it appeared in the course of the evidence that there had been a transhipment of the goods, in accordance with the liberty given to the defendants. It also appeared that transhipments on the voyage from Hong-kong to Bombay are not an ordinary occurrence—in fact they seldom occur.

Now were the packages sufficient ? The judgment of the learned Judge in the plaintiff's favour proceeds upon the ground that there was in this case evidence of usage, which showed that the packages were sufficient within the meaning of the bill of lading.

With the law laid down by the learned Judge, that evidence is admissible to explain the meaning of the contract, and to show what the parties meant by insufficiency of package, I entirely concur. It is not necessary to refer to authorities, which are numerous, on this question ; but, by way of illustration of the principle, and of the mode in which it is applied in cases of this kind, I may mention the cases of *Lucas v.*

Bristow (a) and *Cuthbert v. Cumming* (b). These illustrate the application of this rule of evidence ; and, as I have said, I entirely agree in the law laid down by the learned Judge as to its admissibility.

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But I think that in this case the evidence does not prove such a usage as justified the conclusion arrived at by the learned Judge. The question was whether the parties entering into this contract understood and meant that packages such as these were to be considered sufficient within the meaning of the contract ; and I think that the usage which it was necessary for the plaintiff to show that these packages were to be considered sufficient was a usage of this kind : that, in a case where the goods had been put on board and received by the shipowners under a contract like this the packages were treated as sufficient, and, when damage arose from the state of the packages, the shipowners paid for the damage. It was not enough for the shipowners to receive the package, if they did not, when damage occurred, pay for such damage. Now, it is important to observe that there was no evidence in the case showing a usage of this kind. One witness was questioned with regard to similar claims having formerly been made upon the defendants, and he mentioned that a claim had been made, but he proceeded to say that in that case there had been other damage besides the mere damage which might be attributed to the insufficiency of the packages ; and in answer to a question put to him by the counsel for the defendants he said : " In the case I spoke of, beyond the damage done to the packages, some of the goods were missing ; " and when he was asked— " Have the P. and O. Company ever paid damages in respect of injuries to packages alone, " the question was objected to by the counsel for the plaintiff, on the ground that it was not a matter of custom but of law ; and the question was not allowed to be put. That, in my opinion, is the very question in the case. The point to be determined was whether there was a custom, where a contract contained this stipulation, and the packages were such as were used in the China

(a) E. B. and E. 907.

(b) 11 Exch. 405

1867. trade, to treat these packages as sufficient, and to pay for
P. & O. S. damage to them. Not only was that question not allowed
N. Co. to be put, but there is no evidence in the case to show that
v. this has ever been done, and on the other hand there is evi-
MA'NIKJI dence which shows that from twenty-five to thirty per cent.
N. PADSHA' of these goods usually arrive damaged.

The learned Judge appears by his judgment to have con-
sidered that these packages must be regarded as sufficient
packages, and that the parties intended to treat them as
sufficient within the meaning of the contract, because other-
wise the trade would not have been carried on, and the goods
would not, for so many years as is shown to have been the
case, have been carried in such packages. I do not think
that is a necessary conclusion. It is quite possible that the
persons sending these goods may from various reasons, such
as saving expense or time, have been quite willing to take
upon themselves the risk of sending the goods so packed,
and, at the same time, the shipowners may have been quite
content to take the goods in such packages, protecting
themselves, as these defendants have done, by inserting in
the bill of lading that they were not to be liable for damages
arising from insufficiency of package. The owner of the
goods is content to run the risk of the packages not proving
sufficient for the voyage (especially if they should have to
be transhipped), and the shipowners have no objection to
take them, as they are protected by the stipulation in the
bill of lading. That, it appears to me, is the probable origin
of the insertion and continuance of this clause in the bill
of lading. I do not think that the defendants were bound to
insert, or indeed that they could very well have inserted, in
their bills of lading, precise stipulations as to the size,
strength, or materials of the packages for every particular
class of goods.

For these reasons, while I entirely agree in the view of
the law which the learned Judge took at the trial, it appears
to me that the case is not supported by the evidence, and
that there is no evidence of such a usage as would control
the meaning of the words used in the bill of lading.

Then there is a second question which has to be considered. It is not sufficient that the defendants should make out that these packages were insufficient within the meaning of the contract; they must also satisfy the Court by reasonable evidence that the damage arose from the insufficiency of the packages. Now, with regard to this question, I think that the evidence which was given of the state, in which they were, leads to the conclusion that that was the cause. The evidence of the way in which these packages generally arrived certainly goes to show that they frequently did prove insufficient; and probably in this case the fact, that the damage was greater than in an ordinary voyage, is accounted for by the transhipment which occurred; this being, as I have said, a risk which the shippers took upon themselves, and for which the defendants are not answerable. The shippers were bound by the terms of the bill of lading to send these goods in packages which would be sufficient for transhipment, if such transhipment should occur, because they give the company liberty to tranship. It is probable that, as transhipment very rarely occurs, the packages are not intended to bear the risk of transhipment; and that the parties who send the goods are content to run the risk of it, rather than in every case make the packages much stronger than they need be for the ordinary voyage. It appears to me a fair conclusion from the evidence that the damage arose from the insufficiency of the packages; and I am therefore of opinion that the case on the part of the defendants was made out.

I do not understand that the learned Judge entertained any doubt on that question, or that he was of any other opinion, than that the damage was occasioned by the insufficiency of the packages; but he appears to have thought that the insufficiency was of such a nature as, looking to what he conceived to be evidence of usage in regard to the packages employed in the China trade, the plaintiff ought not to take the consequences of. The substantial question, therefore, upon which the judgment of the learned Judge mainly turned, was whether the packages were shown to be sufficient

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within the meaning of the parties who made the contract. I think that they were not shown to be so. They were in fact insufficient, and there was no such evidence of usage as to show that the parties intended the term "insufficient" to be used in the contract in such a way that these packages, which were frequently employed in the China trade, must be considered as sufficient, and that if damage was caused the shipowner was to pay for it. I think the evidence failed to show that; and therefore I am of opinion that the decree of the court below must be reversed, and a decree made in favour of the defendants with costs.

WESTROPP, J.:—I concur in the remarks of the Lord Chief Justice. It was, no doubt, quite correctly laid down in the Division Court, by my brother Arnould, that the burden lies on the defendants to excuse themselves as to the damage which accrued to the goods.

To do so, the defendants point to their bill of lading, which guards them against insufficiency of package, and provides for the contingency of transhipment. The packages, therefore, in order to satisfy the terms of the contract, should have been sufficient not only for an ordinary direct voyage from Hongkong to Bombay, but also for the less frequent event, of a voyage interrupted by transhipment. That the packing, though possibly of the usual strength and scantling for goods of the nature shipped, was "insufficient," in the popular sense of that word, for even an unbroken voyage, is, I think, unquestionable. There is satisfactory evidence that such packages were too weak for the duty which they had to perform, would bear but little handling, and were, even in ordinary voyages, usually damaged to the extent of from twenty-five to thirty per cent. Many witnesses state that cargoes from China were generally more or less damaged. Two independent witnesses, one a respectable officer of the customs, and the other the Chief Assistant in the Landing and Shipping Company, deposed to the percentage of damage which I have mentioned. Still greater then must have been the insufficiency of the packages (using that term in the same sense,) to withstand the double hardship of a voyage broken by transhipment. This being so, the

burden devolved upon the plaintiff to show that, although within the ordinary meaning of the term insufficient, yet the packages were, within the mercantile meaning of the term, and according to mercantile usage, sufficient. I have been unable to perceive any evidence of such mercantile usage. It is true that like goods, so packed, were frequently carried by the defendants; but as they carried, so they protested. They, by their bills of lading, protested, on each occasion that they carried those goods, against being held liable for insufficiency of package. The mere fact of their constantly carrying the goods, so packed, could neither obliterate nor alter an express stipulation contained in the bills of lading under which they were carried. The onus being upon the plaintiff to show that, albeit insufficiently packed in the popular sense of the term, the goods were sufficiently packed according to the glossary of merchants and shipowners, the only way I can suggest in which the plaintiff could have established that proposition was by showing that compensation has heretofore been made in similar cases, it being in evidence that this was an ordinary mode of packing, and that injury to such packages frequently occurred. There is not, however, an iota of evidence to show that *such* injury had ever been paid for. The defendants' counsel have not shrunk from that issue. They put the very question, but, on the objection of the learned counsel for the plaintiff, it was disallowed. It seems to me to have been the vital question in the case. Two, indeed, of the plaintiff's witnesses stated that the company had paid damages on previous occasions, but it turned out that the payment was made because a considerable portion of the goods had been carried off by plunderers at Galle during transhipment. In order to prove that the packages were sufficient in a mercantile sense, it should have been shown that the company, and traders to China, agreed to treat as sufficient such packages as these, and that, if not this particular company, at all events other companies and shipowners, had made compensatory payments for such injury as is the subject of this action. But there was no evidence to that effect. Mihirvánji

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1867. Hormasji, a witness examined *for the plaintiff*, and who is an Inspector at the Custom House, said that "English packages generally arrive safe in Bombay. China packages are not nearly so strong as English packages. China packages arrive broken more frequently than English." Mr. Dixon, Lloyds' Surveyor, examined on behalf of the defendants, said, "there is so much China cargo arriving broken in Bombay that, as a general rule, if the contents arrive sound, though the packages may be more or less broken, they (the consignees) accept;" and again: "as a general rule, consignees of produce from China do not object to more or less breakage of the outer case, as broken cases from China are very common." My brother Arnould, in his judgment, refers to Mr. Parker's evidence as to a greater percentage of *claims* being preferred against the company for damage on goods brought from Europe, than on those brought from China. A greater number of *claims* does not necessarily show a greater proportion of *damage*. The evidence of Mihirvánji Hormasji, to which I have referred, to the effect that a greater proportion of packages imported from China are broken than of those arriving from England, proves that such an inference would be erroneous. The fact, therefore, that more claims are made against the company in respect of packages conveyed from Europe, than of packages conveyed from China, is far from being an assistance to the plaintiff. The evidence of Mr. Dixon, to which I have referred, proves that China packages are customarily accepted in a more or less broken state by consignees, without objection. The comparative paucity of claims, in the case of China boxes, is, I think, attributable to the generally recognised insufficiency of the packing. The same forbearance is not shown by merchants in the case of English packages, which, being much stronger, are expected to be conveyed in safety. Shippers have been, for reasons best known to themselves, satisfied to transmit goods, similar to those the subject of this suit, from China, packed in an inferior manner, inadequate to sustain the wear and tear of the voyage to Bombay.

The company have wisely guarded themselves against responsibility for that insufficiency, and cannot be now compelled to forego the benefit of the stipulation.

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Decree reversed with costs.

Acland, Prentis, and Bishop, Attorneys for the plaintiff.

Crawford and Hurrell, Attorneys for the defendants.

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*Suit No. 1553 of 1866.*

Aug. 2.

**JEHANGIR RASTAMJI MODI** ..... *Plaintiff.*

**SHA'MJI LA'DHA' et al.** ..... *Defendants.*

*Joint Stock Company—Directors—Shares—Purchase ultra vires—Trustee Shareholder—Acquiescence.*

The purchase by the Directors of a joint stock company, on behalf of the company, of shares in other joint stock companies, unless expressly authorised by the Memorandum of Association, is *ultra vires*.

A joint stock company, even though it be empowered by its Memorandum of Association to deal in the shares of other companies, is not thereby empowered to deal in its own shares, and a purchase by the directors of the company of its own shares on behalf of the company is, therefore, under such circumstances, *ultra vires*.

A shareholder in a joint stock company can maintain an action against the directors of such company to compel them to restore to the company funds of the company that have by them been employed in transactions that the directors have no authority to enter into, without making the company a party to the suit.

Where a shareholder purchased shares in a joint stock company knowing at the time that similar companies were in the habit of dealing in their own shares and those of other companies, and believing that the company in question adopted the same practice, but made no inquiry to ascertain whether or not such was the case, nor made any objection to such dealings of the company until it was discovered they had resulted in loss, it was held that he had by his own conduct lost his right to hold the directors personally liable in respect of such dealing, and the result was held to be the same whether the said shareholder was beneficially entitled to his shares, or merely a trustee of them for others.

THE plaintiff stated that (I.) the plaintiff was the registered shareholder of 601 shares in the Financial Association of Europe and India (Limited) registered under Act XIX. of 1857.

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II. That the defendants were the original directors of the association, with one Govind Girdhar, and ever since continued to act as such.

III. That the objects of the association, as defined in the Memorandum of Association, did not include dealing in shares, nor the purchase of the company's own shares; yet the defendants as directors did deal in shares, and thereby incurred losses on behalf of the company, and did purchase 1,422 shares of the company.

The plaintiff, therefore, on behalf of himself and the other shareholders of the company, prayed—

(a) That the defendants should account for all dealings in shares purporting to have been entered into by them on behalf of the company, and should pay all losses thereby incurred to the company.

(b) That the defendants should repay to the company all moneys of the company expended by them in the purchase of the company's shares.

(c) That the shares of the company so purchased should be entered in the register of the company in the defendants' names, or in the name of some one of them on behalf of the others.

(d) For further and other relief.

The defendants put in a written statement in which they stated—

I. That the plaintiff was not the beneficial owner of the shares mentioned in the plaint, but was only a trustee of them for two other persons, and that he, therefore, could not maintain the suit.

II. That the Financial Association ought to have been made a party to the suit.

III. That they, as directors, had power to deal in the shares of joint stock companies, including the shares of the association.

IV. They admitted that they had dealt in shares, including the shares of this association. The said dealings down

to the 31st of December 1865 were stated in the report and audited balance sheet submitted to the general meeting of the shareholders of the association held on the 2nd of July 1866, at which meeting a resolution was duly proposed and seconded that the audited balance sheet and report for the year ending 31st December 1865 be adopted. To this an amendment was proposed by the plaintiff, and duly seconded, that, "as the balance sheet contained an account of the purchase and sale of joint stock companies' shares on account and at the risk of the association, and, as it appeared from the Memorandum and Articles of Association that the directors had no power to deal in these shares, the balance sheet, and profit, loss, and loan account be amended to that effect." On the said amendment being put to the vote, it was lost, and the original resolutions carried. They submitted that, under Cl. 92 of the Articles of Association, the balance sheet and transactions mentioned in it had become binding against the shareholders;—at any rate, that the plaintiff ought to have brought his suit within three months.

V. and VI. Since the said 31st of December 1865 the directors purchased 1,750 shares in the association, which did not appear in the first balance sheet, and that these purchases were made in accordance with resolutions of the Board to that effect in the *bonâ fide* exercise of the powers conferred on them.

VII. That the said shares stood in the name of trustees for the association, and that the purchase of them was beneficial to the association.

VIII. That the beneficial owners of the plaintiff's shares were aware of the purchases made by the directors.

Memorandum of Association, Cl. 3:—"The objects for which this company is established are the following:—The purchase and sale on commission of stocks, shares, debentures, and other securities; the making of advances on such securities as the directors of the company may think fit; the receipt and employment of loans and deposits; the negotiation and making of loans and subsidies for public or

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private purposes or undertakings ; the introduction, establishment, aiding, and assisting of public and other companies, undertakings, and enterprises ; the conduct and management of exchange operations ; the conduct and management of such other operations, undertakings, and enterprises of a financial character as the directors of the company may think fit, and the doing of such things as are incidental or conducive to the attainment of the foregoing objects."

Articles of Association, Cl. 81 :—"The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing or maintaining buildings of the company, or any part thereof, and the directors may invest the sum so set apart as a reserved fund upon such securities as they may think fit."

Cl. 92 :—"Every account or balance sheet when audited and approved by a general meeting shall, as to the matters contained therein, be conclusive as against the company and the shareholders therein, except as regards any error discovered therein within three months next after the approval thereof, and whenever any such error is discovered within that period and shown to exist, the account shall forthwith be corrected, and thenceforth shall be conclusive as aforesaid."

Cl. 112 :—"All investments on behalf of the company, whether on account of the reserve fund or otherwise, and all property, moveable or immoveable, personal or real, to which the company may become entitled in the course of its business, and which it may be necessary or advisable to vest in the company or in some person on its behalf, and all contracts or engagements which the company may have occasion to make and enter into may be made and vested, or made and entered into, either in the name of the company, or in the name or names of, or in one or more of, the trustees, or of or in such other officer or person as the Board may think fit, and such trustee or trustees, or other officer or person, shall be bound to act in respect to such invest-

ments, property, contracts, and engagements according to the directions of the Board, and in so doing shall be indemnified as hereafter mentioned."

The issues framed were—

(1.) Whether the company ought not to be made a party as defendant in this suit; (2) Whether the purchase of its own shares by the company was *ultra vires*; (3) Whether the purchase of shares in joint stock companies was *ultra vires*; (4) Whether the purchase mentioned in the report and balance sheet referred to in the fourth paragraph of the plaint were adopted and ratified by a general meeting of the shareholders of the company, and if so whether such adoption and ratification rendered such purchase valid; (5) Whether, under the circumstances of the case, the plaintiff is estopped from instituting the present suit.

A sixth issue was subsequently added—(6) Whether the defendants can in any case be held personally liable.

The first issue was abandoned on the learned Judge intimating his opinion that the company was not a necessary party.

The second and third issues were argued, before SARGENT, J., on the 15th, 18th, and 19th of July 1867.

*The Advocate General (the Honorable L. H. Bayley) and Marriott for the plaintiff.*

*Pigot, White, Mayhew, and Green for the defendants.*

The following authorities were cited and commented on in the course of the argument:—

*Colman v. The Eastern Count. Rail. Co. (a); Bayshaw v. The Eastern Union Rail. Co. (b); East Anglian Rail. Co. v. Eastern Count. Rail. Co. (c); South Yorkshire v. Great Northern Rail. Co. (d); Shrewsbury and Birm. Rail. Co. v. London and N. W. Rail. Co. (e); Solomans v. Laing (f); Cohen v. Wil-*

(a) 16 L. J. Ch. 73. (b) 19 L. J. Ch. 410.

(c) 21 L. J. C. P. 23. (d) 3 DeG. Maen. & G. 576—9 Exch. 55.

(e) 26 L. J. Ch. 482; 6 Ho. Lo. Ca. 113. (f) 19 L. J. Ch. 291.

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*Cur. adv. vult.*

July 22. SARGENT, J.:—In this case I have thought it advisable to decide the questions raised by the second and third issues before proceeding with the further hearing. They are—(1) Whether the alleged purchases by the company of shares in other companies are *ultra vires*; (2) Whether the alleged purchases by the company of its own shares are *ultra vires*.

A long series of decisions of the courts of Law and Equity in England has decided that an incorporated joint stock company can do no act which is not expressly or impliedly authorised by the Act of Parliament under which it is incorporated, or the Deed of Settlement of the company. In the present case the company was incorporated under Act XIX. of 1857; and it has not been contended that there is any clause in that Act authorising the transactions now under consideration. It is, therefore, to the Memorandum and Articles of Association that we must turn to determine whether those transactions are expressly or impliedly authorised; or, as it has been sometimes expressed, whether they fall

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|-------------------------------|------------------------------------------|------------------------|
| (g) 18 L. J. Ch. 411.         | (h) 4 E. & B. 397.                       | (i) 32 L. J. Ch. 382   |
| (j) 5 Jur. N. S. 478 and 969. | (k) 1 Maen. & G. 225.                    |                        |
| (l) 20 L. J. Ch. 295.         | (m) Turn. & R. 496.                      | (n) 2 Coop. C. C. 358. |
| (o) 19 L. J. Ch. 389.         | (p) 29 L. J. Ch. 561; 8 Ho. Lo. Ca. 712. |                        |
| (q) 10 Jur. N. S. 1118.       | (r) 12 Jur. N. S. 899.                   |                        |
| (s) 1 L. R. 593.              | (t) 5 Jur. N. S. 355 and 612.            |                        |
| (u) 5 Jur. N. S. 1096.        | (v) 31 L. J. Ch. 340.                    |                        |
| (w) 2 Jones & Latouch 112.    | (x) 5 DeG. Maen. & G. 911.               |                        |
| (y) 1 Maen. & G. 170.         |                                          |                        |

within the scope of the objects for which the company was established.

It is right to state at the outset that the purchases of shares in other companies are admitted by the directors to have been made out of the subscribed capital of the company and in the ordinary course of business, and with the view to the shares being resold, and a profit obtained for the company; and that contracts were entered into for the sal<sup>e</sup> of these shares for both immediate and future delivery. They were distinct acts forming no part of any larger enterprise, which might or might not have been legally engaged in by the company, and as such must stand or fall.

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Now the third section of the Memorandum of Association states the objects for which the company was established; and the first clause that has been pointed to as authorising such purchases is "the receipt and employment of loans and deposits." It is contended that deposits must here mean the deposits paid by allottees; and that, as no restriction is placed upon the mode of employing such deposits, these purchases would be clearly a legal application of the funds. The context seems to me to show clearly that the deposits alluded to in this clause are deposits which it required a direct authority to the company to receive. The section (omitting intervening words) says that the object for which this company is established is the receipt of deposits. Now by the objects for which a company is established are of course meant the operations to be carried out after the company is formed, and cannot refer to acts which precede the formation of the company, and which must *ex necessitate rei* have been performed before the company can be said to have an object at all, or at least to be capable of realising one. I can feel no doubt, therefore, that the deposits referred to in this clause are the sums which, since the establishment of joint stock companies, it has become not uncommon for individuals to pay, more generally it may be into banks, but which it was supposed they might also pay into this company, either for temporary safe custody, or for longer or shorter periods upon such terms as the parties should agree.

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It was next contended that the purchases in question were operations and enterprises of a financial character, and as such authorised by the clause which states that one of the objects of the company is "the conduct and management of such operations, undertakings, and enterprises of a financial character as the directors of the company may think fit." It must be admitted that shares are securities within the contemplation of the framers of the Memorandum of Association. The very first clause describes them as such in conjunction with stocks and debentures; and I think it must also be conceded that the purchase of securities is a financial operation: but the difficulty lies in the language which has been employed in describing the part which the company is to play in these operations, undertakings, and enterprises. The words are "the conduct and management of such operations, undertakings, and enterprises." In other words, the company is "to conduct and manage these operations." Do not these words point clearly to operations carried on for and on account of other persons, and not to operations undertaken by the company *proprio motu* for its own benefit and profit? Surely, if this was not the intention, the words "engage in" and "undertake" would have been employed. It seems to me that the language has been studiously selected to confine these financial operations to those in which the company should act as agent or auxiliary, and not as principal.

It was asked in what sense they could be said to conduct and manage exchange operations otherwise than as principals. The answer is, by doing all such acts as would be incidental or conducive to the success of the exchange operation which the party applying to the company might wish to effect.

It was then contended that by Sec. 112 of the Articles of Association, which speaks of investments, on account of the reserve fund or otherwise, in moveable or immoveable property, no limitation is placed upon the mode of investment—indeed that in the case of the reserve fund the investment is, by Sec. 81, to be upon such securities as the directors

may think fit ; and that securities, by Sec. 3 of the Articles of Association, include shares. Now the object of this section was solely to provide for the vesting of all property to which the company might become entitled, in the course of its business, in such trustees as the company might appoint ; and, as might be expected, the largest possible words are employed to meet every case that could possibly arise. Doubtless those words include shares ; but shares might become legally vested in the company in a variety of ways, either by being bought on commission, and not transferred for a longer or shorter period, arising out of the numerous circumstances which cause delay in such transactions, or by the repudiation of the purchases by the principals for whom the company may have acted, or by being taken as a security for loans, or in the course of introducing or assisting other companies. I mention these particular cases to show how necessary it was in a section, framed with such an object, to employ general terms, and that nothing can be inferred from the general description of property there used as to whether any particular transaction is or is not within the powers of the company. On the other hand, it is to be remarked that, assuming the general words "conduct and management of such operations, undertakings, and enterprises as the directors may think fit" to refer exclusively to operations in which the company embarks for or on account of other persons, the principle of *expressio unius exclusio alterius* would be clearly applicable in this case. The very first object of this company is said to be "the purchase and sale of shares on commission," which, in the absence of any general words (and *ex hypothese* there are none), would exclude purchases by the company on its own account for the purpose of profit in the way of business.

The conclusion, therefore, that I have arrived at—I will not say without hesitation—is that these purchases were not within the power of the company. It may be that the company might purchase shares for the purpose of introducing or assisting other companies, and that it might do

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so as incidental or conducive to the conduct and management of a financial operation or enterprise; but the purchase of shares *proprio motu* for the purpose of re-sale, and thus deriving profit—as a distinct transaction, and forming no part of the larger operations to which I have before referred—was, in my opinion, *ultra vires*.

It remains now to consider whether the alleged purchases by the company of its own shares were *ultra vires*. After the decision I have come to on the first question, it is not, strictly speaking, necessary for me to refer to those arguments which derive their force from the assumption that the purchase of shares in other companies is not *ultra vires*.

I am unwilling, however, to decide only half the question, and shall, therefore, consider it under its twofold aspect. And first I assume, for the sake of argument, that the purchase of shares in other companies is not within the scope of the objects of the company. There is, therefore, no authority to the company to buy its own shares to be implied from the objects for which the company was established; and as the Articles and Memorandum of Association contain no express authority, the purchases in question were made without any authority, express or implied, contained in the contract of partnership between the shareholders.

Now, a long series of decisions in equity has determined that, if such authority be wanting, purchases by directors of shares from individual shareholders are *ultra vires*. The earliest case in which the validity of these purchases would seem to have called for a decision is that of *Taylor v. Hughes* (*ubi supra*), but, as Lord St. Leonards decided that the purchases were expressly warranted by the Deed of Settlement, the case throws no light on the question under consideration.

In *Morgan's Case (supra)*, which was a purchase of shares from shareholders with a view to raising funds to meet the pressing wants of the creditors, Lord Cottenham held that there could be no valid sale of shares to the company except under the special circumstances in which the company had express authority to purchase, and that the sales in question, not having taken place under those special circumstances,

were consequently invalid. In the case of *Evans v. Coventry*, (*ubi suprd*), before Vice-Chancellor Kindersley, which was a suit by certain persons assured in the General Life Assurance Company to compel the directors to restore the capital expended in the purchase of shares of the company, the Vice-Chancellor seems to have assumed that, as there was no express authority to the directors to buy shares for the company, the purchases were *ultra vires*; and then proceeds to give other reasons, having special reference to the relation of trustee and *cestui que* trust which he had previously decided was created between the directors and the insured.

In *Spackman's Case*, before Lord Westbury, and in *Stanhope's Case*, before Lord Cranworth, it was assumed that the sales to the directors, unless they could be regarded as effected under the power to compromise, were *ultra vires*, and the important question was whether the company was estopped by lapse of time and by other circumstances from disputing the validity of the sales.

There are other cases, such as the *Joint Stock Discount Co. v. Brown*, and *Gregory v. Patchett*, decided upon demurrer, in which observations of the learned Judges to the same effect may be found; but, as they are decided upon strict grounds of pleading, they cannot be cited as conclusive authorities.

These decisions are, in my opinion, conclusive that purchases by directors of shares of a company in the absence of authority are *ultra vires*.

It remains to consider the question on the assumption that the purchase of shares generally is within the scope of the objects for which the company was established.

It is said that the company's own shares are bought and sold in the share market, like all other shares, and that if the business of the company is to speculate in shares there can be no reason why it should not speculate in its own shares, and that there is an implied authority to the company to purchase its own shares, from the general character of its business. Now, in the first place, by the objects for which a company is established are *prima facie* meant the opera-

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tions it is intended to engage in with third persons for the purpose of profit. Those third persons, it is true, may be individual shareholders acting as individuals. As such they come within the purview of Sec. 3 of the Memorandum of Association, like other persons. But as shareholders dealing with their shares, their relations with the company must be sought for in the other provisions of the Memorandum and Articles of Association. Indeed, it is almost a contradiction in terms to say that one of the objects of the company is to contract with its own shareholders for the purchase of its own shares.

It, therefore, appears to me that, according to the ordinary rule of construction, Sec. 3 must be read with regard to its subject-matter, and that its subject-matter being *ex vi termini*, the various descriptions of business which the company may engage in with individuals *dehors* the company, and not with shareholders acting as such, the dealing in shares, so far as it derives its legality from Sec. 3, must be confined to dealing in the shares of other companies. So far I have proceeded upon what may be considered a technical view of the subject.

If it be said that, although authority to the company to buy its own shares cannot be considered as given by Sec. 3, it may yet be inferred from it, the answer is that no inference can reasonably be drawn respecting transactions which cannot be supposed to have been within the contemplation of the framers of the section. Again, by the purchase of a share of the company, it is true that so long as the share purchased retains its value there is not substantially any reduction in the capital, and the risk of the value of the share falling is the same as there would be in the purchase of shares of other companies, which *ex hypothese* is within the scope of the business; but there is this important distinction, that in the case of the purchase of the company's own shares the liability of the remaining shareholders is increased. No new shareholder is placed upon the register in lieu of the outgoing shareholder, for although the trustee in whose name the shares may be entered on behalf of the company is liable to be placed on the list of contributors in the event

of the company being wound up, it is the company, that is, the remaining shareholders, who are ultimately liable to creditors. The share has been virtually purchased by an abstraction, and the personal liability, which would in ordinary cases have passed to the transferee, has, in this case at least to the extreme limit of their liability, been saddled on the remaining shareholders.

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Again, the Articles of Association, which are the contract of partnership between the shareholders, and by which all are bound, authorise the transfer of shares by a shareholder in a certain mode, namely, by the transfer of his shares to another person ; but in the case of a purchase by the company, although there is nominally perhaps a transfer to another person, there is really only a transfer to an abstraction. These provisions were intended for the security of the shareholders, and to determine the mode in which shareholders may withdraw from the partnership. Are all these considerations to be deemed to have been waived, so to speak, by the shareholders, and the express provisions of the Articles of Association to be virtually rescinded, by the mere circumstance that the purchase of shares generally is authorised by a section the sole object of which is to determine the object and purpose of the company ? I think that such would be a most unreasonable and strained inference.

I have already pointed out that technical considerations forbid any inference being drawn from Sec. 3 as to transactions which whether carried out in the directors' room or in the share market are alike transactions between the company and the shareholders as such ; but the considerations lastly mentioned would, in the absence of any such technical rule of construction, be sufficient, in my opinion, to preclude the extension of the provisions of Sec. 3 to any contract entered into with the shareholders as such. The relations between the company and shareholders must be sought for in other sections than those which determine the objects for which the company was established, and if no authority is elsewhere given (and in the present case it is not alleged that there is), it is impossible, consistently with

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the decisions already cited, to decide otherwise than that these purchases by the company of its own shares were *ultra vires*.

I have not arrived at this decision without some regret, as I cannot but be aware of a fact perfectly notorious, that it has been the practice not only of companies similar to this, but for other companies, to purchase their own shares, and that this decision may press somewhat harshly upon individuals ; but at the same time if joint stock companies are to flourish, more especially in a country like this, it can only be by the public feeling assured that the Courts of Law, while refusing to interfere with directors in carrying out the objects of these associations into full and complete activity, will prevent the application of the funds of the company to other than the legitimate purposes and objects of the association. I, therefore, find both the issues in favour of the plaintiff.

The first three issues having been thus found in favour of the plaintiff, evidence was taken on the 22nd of July and subsequent days on the remaining issues, when the facts stated in the plaint and written statement were in substance proved.

Aug. 2. SARGENT, J.:—Before I proceed to the remaining issues in this case, I will refer to an objection that has been taken with reference to the power of a shareholder to bring a suit of this description against directors. The case of *Hodgkinson v. The Live Stock Insurance Co.* (*ubi supra*) is on all fours with the present, and on the authority of that decision I have no doubt that a suit of this nature may be so brought. Then there are two preliminary objections, which it is also advisable to dispose of at present. The first of these objections is that the balance sheet adopted by a general meeting on the 2nd of July 1866 is, under Sec. 92 of the Articles, binding as against the company and the shareholders. Assuming that the section does apply to such a case as this, it is sufficient that the plaintiff, on discovering the error in the balance sheet, should draw the attention of the directors to it ; and in point of fact he did

so at the general meeting of the 7th of July. It is difficult to see what more he could have done. The second objection is that, under Sec. 115 of the Articles, the directors are not personally liable "for any misfortune, loss, or damage happening to the company by reason of any deed or thing done or executed by any director or trustee in the execution of his office, or in relation thereto, or by reason of any error in judgment or mere indiscretion on the part of any director or trustee in the execution or performance of his powers or duties, or otherwise on any account whatsoever except only for wilful fraud or negligence." Now it is quite clear that this section refers to the liability of directors to the company arising out of the relationship of principal and agent in which they stand to one another, but in any case it is very questionable whether it can be taken to refer to anything but what was done in the execution of the powers or duties of the directors. I think, therefore, that the section is clearly not applicable to the case before the Court.

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I now proceed to the remaining issues. The plaintiff is the registered holder of 601 shares in the defendants' association, the history of which may be shortly stated. [His Lordship here stated the facts which showed that the plaintiff was a trustee of these shares, and proceeded.] In my opinion the right of the plaintiff to institute these proceedings is quite independent of the question whether he is entitled to the beneficial interest in them. As the registered holder of the shares, he alone is liable to creditors, and he alone is liable to be placed on the list of contributories. He has, therefore, a direct interest in the proper application of the funds of the company, and a direct interest in their being restored if misapplied.

Again, there is no privity between the directors and the person beneficially interested in the shares. It is between the registered shareholder alone, and the directors, that the relation of trustees and *cestui que* trust is created, and out of that relationship springs the right to hold the directors liable for their breach of trust. It is, therefore

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equally clear as a co-relative proposition, that if the plaintiff would be estopped from filing this plaint if he were the beneficial owner of the shares, he will be equally so if he is only a trustee for others. His right to bring this action belongs to him only as shareholder, whether he brings it for the benefit of others or not.

Is the plaintiff then estopped by his own conduct from holding the directors liable for the alleged breaches of trust? It is admitted by the plaintiff that when he bought the fifteen shares in January 1865 it was well known that the financial corporation bought and sold shares generally; that he knew of no instance of their refusal, and that when he bought the shares he thought the defendants' company did like other financials. From that time till two or three days before the general meeting of the 2nd July he tacitly acquiesced in this description of business being carried on. He says indeed that at the end of June he did not know that the defendants' company had been buying their own shares. It may be that he did not personally know of any particular transaction, but is it possible to believe that the plaintiff, who was the Secretary of the Imperial Banking Corporation, in daily correspondence, as he says, with brokers, engaged in share speculations on his own account and living in the world of commerce, could have been ignorant of the share transactions which the defendants' company carried on in 1865 on a scale to result, as the plaintiff himself says, in a loss of sixteen lakhs of rupees?

I have no difficulty in inferring from all these circumstances that the plaintiff knew that the defendants' company carried on the business he now complains of, and acquiesced in it.

We have then here that acquiescence, albeit without original concurrence, on the part of *cestui que trust*, which Lord Eldon says, in *Walker v. Symonds*, releases the trustees from their liability. But let us suppose for a moment that the plaintiff had no personal knowledge that the defendants' company carried on this illegal business. It is true that there is no acquiescence without a knowledge of the circumstances. But here there is such a knowledge of the general practice of these companies, coupled with an entire

belief that the defendants' company did like the rest, as should have put the plaintiff on inquiry had he not acquiesced. Knowledge of so much of the circumstances as would put any reasonable man upon further inquiry is sufficient, and the very fact that he makes no further inquiry is the strongest proof that he acquiesces. Having assumed the character of a shareholder in a full belief that the company were engaged in this business like all other financial companies, having sought for no information from the company—having lain by for eighteen months, and tacitly acquiesced in what he fully believed was being done with the funds of the company, although by hypothesis he did not know it as a fact, can he now, because the business has resulted in a loss to the company, hold the directors liable for the consequences? I think not. Such conduct is certainly contrary to all notions of equity and justice, as those words are commonly understood—and I should be loth to think that it derived support from the principles acted upon in the Courts of Equity. I am, therefore, of opinion that the plaintiff is precluded from complaining of any of the illegal transactions previous to the meeting on the 2nd of July 1866. On that occasion he expressed his disapprobation of the practice, and from that time his acquiescence ceased.

Now the purchase-money of the 312 shares from the firm of Nasarvánji Dungarsi and Company was paid on the 6th and 12th of July, that is, subsequently to the general meeting, and was, therefore, a payment for which the directors rendered themselves liable. If the contract was illegal, the plaintiff is not estopped by his general conduct previous to the general meeting from calling on the directors to refund the moneys so applied. The same remark applies to another small transaction—subsequent to the general meeting the particulars of which I have not before me.

Whether or not the plaintiff knew of the sale of 312 shares cannot affect the question. It would not carry his acquiescence further than his general conduct does—that is, up to the time when he withdrew his consent at the general meeting.

As to the knowledge of Mihirvánji, and the firm of Nasarvánji and Company through him, that the sale was

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to the association, I have already stated my opinion that it cannot affect the plaintiff's right to have the misapplied funds restored to the company. To what purpose those funds, when restored, will be applied, must depend upon the future proceedings of the company. As the company is now engaged in winding up its affairs with a view to a dissolution, the moneys in question will either go towards payment of the debts, or form part of the assets divisible amongst the shareholders.

What right, if any, the directors may have (in the latter case) to refuse the plaintiff his share of the funds represented by the 586 shares, on the ground that the firm was cognisant of the real purchases of the 312 shares, I am not called upon to decide. The firm of Nasarvánji and Company are not parties to this suit; and, as their rights cannot be concluded, I shall forbear to say anything on the subject. I, therefore, find all the issues for the plaintiff, and pass judgment for the plaintiff, that the defendants do pay to the company the sum expended in the purchase of the 312 shares, and the other transaction I have before alluded to, and that the 312 shares of the company be transferred into their names in the books of the company. As to the other transaction, I am not acquainted with the exact nature of it—whether it was a purchase of shares in the defendant's own company or of some other company. The minutes of decree will have to be drawn up accordingly. The parties will pay their own costs.

*Decree for the plaintiff without costs.*

*Late Supreme Court, Equity Side.*

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Oct. 11.

The ADVOCATE GENERAL *ex relatione* DAYA MUHAMMAD,  
MUHAMMAD SAYA, PI'R MUHAMMAD KA'SAMBHA'I, and  
FA'ZALBHA'I GULA'M HUSEN,

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KHA'N) *et al.*

Terms on which new relators will be allowed to come in after decree to  
prosecute an appeal.

THIS (commonly called *the Khojá Case*) was an information  
and bill filed on the Equity side of the late Supreme  
Court by the Advocate General on the relation of the above-  
named relators, who were also plaintiffs.

The suit came on for hearing before ARNOULD, J., on the  
16th of April 1866. The hearing occupied that and several  
succeeding days.

Nov. 12. A decree was given for the defendants, and the  
suit as against A'ga' Khán and those defendants in the same  
interest with him was dismissed, with costs to be paid by the  
relators and plaintiffs, and as against the other defendants,  
not in the same interest, without costs.

On a subsequent day (Feb. 1st, 1867) the costs of the  
Advocate General were directed to be paid by the relators  
and plaintiffs.

April 27. Dunbar (with him Macpherson), on behalf of the  
relators and plaintiffs, moved for leave to appeal to the Privy  
Council against the decree of the 12th of November 1866.

The Honorable L. H. Bayley (Advocate General), (with him  
Howard), for the first defendant, opposed the application.

Marriott (with him Hayllar) and Green (with him  
McCulloch) opposed on behalf of other defendants.

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PER CURIAM (ARNOULD, J.) :—Leave to appeal to the Privy Council granted, subject to deposit by the appellants with the Registrar of the sum of Rs. 10,000 in Government Promissory Notes, as security for costs of such appeal.

An order (9th August 1867) was subsequently made, by which it was directed that the Rs. 10,000 should be deposited on or before the 7th of September 1867.

Sept. 5. *White*, on behalf of Fázal Habíbbhái and Ráhim Hemráz (petitioners), one of whom was an original defendant not in the same interest as A'gá Khán, and the other a stranger to the suit, moved for a *rule nisi* that the petitioners, or such other persons of their nomination as might be approved of by the Court, should be substituted as relators in place of the then relators, with liberty to institute and proceed with the appeal, on their giving security for costs of such appeal ; and that the time for giving such security should be extended to the 7th of October 1867.

*Rule nisi.*

This rule came on for argument on the 3rd of October 1867.

*Marriott*, for the original relators, moved that they should be dismissed from the suit.

*The Honorable L. H. Bayley* (with him *Pigot*), for A'gá Khán, showed cause against the *rule nisi* of the 5th of September, and contended that if the new relators were allowed to be substituted for the original relators, it should only be done on terms of their giving security not only for the costs of appeal, but also for the costs incurred by the defendants in the court below. They cited *The Attorney General v. The Corporation of Cashel* (a).

*Mayhew* and *Green* appeared on behalf of the other defendants.

*Ferguson* appeared for the Advocate General, and assented to the application on the terms contended for by A'gá Khán.

*White* (with him *Dunbar*) supported the *rule nisi*.

PER CURIAM :—Old relators to be dismissed from the suit

(a) *Sau. & Sc.* 333.

on payment of costs. New relators to be substituted on certain terms. Minutes to be spoken to.

Oct. 11. The case came on again on the minutes, and to settle the terms on which the new relators should be allowed to prosecute the appeal. The terms then settled differed materially from the terms settled on the 3rd of October, and were as follows :—

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I. On paying their own costs of this application for that purpose, the old relators to be allowed to withdraw from the further prosecution of the appeal.

II. Fázal Habbíbháí and Ráhim Hemráz to be substituted as new relators, in the stead of the old relators, for the purpose of prosecuting the appeal, and to be allowed, as such substituted relators, to prosecute the appeal on the following conditions :—

(a) That they lodge, on or before 4 P.M. on Monday the 9th of December 1867, the sum of Rs. 10,000 Government five per cent. promissory notes as security for the costs likely to be incurred in the appeal.

(b) That, on or before the said day and time, they also give security for the costs awarded to the defendants and the Advocate General by the decree in this cause, in an amount sufficient to cover the aggregate amount of such costs ordered to be paid by the original relators and plaintiffs under the decree of November 12th, 1866.

(c) Unless the conditions (a) and (b) are complied with, appeal not to be proceeded with, but at once to cease and determine.

III. The proceedings by the defendants and the Advocate General for recovery of their costs by execution under the decree, to be stayed from present date until further order.

Any attachment issued by the defendants or any of them, or by the Advocate General, on the property of the old relators or otherwise, for recovery of costs under decree, to be raised immediately on the giving by the petitioners of the security for such costs.

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IV. The new relators to pay all costs of all parties appearing, on their application to be substituted as new relators.

Petitioner and parties respectively to pay their own costs of this day (11th October).

NOTE.—March 14th, 1868. *Anstey and Fooks*, before the Judicial Committee of the Privy Council (a), appeared in support of a petition for special leave to appeal from the above order of the 11th of October, and prayed that the proceedings, evidence, judgment, decrees, and orders made in the above suit, so far as the same related to the matter of the appeal, should be transmitted, or that such further or other order, as to Her Majesty in Council might appear just and proper, should be made. *Anstey* contended that as an order had been made on the 3rd of October, allowing the new relators to be substituted for the old relators, and ordering the Advocate General to allow his name to be used on certain terms, the Court had no power to alter such terms, as it did by the order of the 11th of October. [Lord WESTBURY :—Does the Advocate General appear?] He does not. This application is *ex parte*. [Lord WESTBURY :—How, then, can we possibly entertain it? We cannot go into the merits of a petition which is directed adversely in fact against the Advocate General, in the absence of the Advocate General.] *Fooks*, on the same side :—This is a bill for relief as well as an information, and, so far as it is a bill, may be treated as a separate proceeding. I ask, therefore, to be allowed to amend the petition, and that my clients (one of whom was a defendant below), whose interests are injuriously affected by the decree, may have leave to appeal, making the Advocate General, and the original relators and plaintiffs in the court below, respondents for that purpose. We cannot do this without leave, and I submit this is the proper court to apply to for such leave. If your Lordships can see your way towards doing so, you will not allow this appeal, which is upon a question of great magnitude and importance, to be technically defeated. If leave, such as I contend for, be granted, it will of course only be upon certain terms. The equitable terms, I submit, were those ordered by the Court in the case of the original relators when they applied for leave to appeal, viz., the deposit of Rs. 10,000 to meet the costs of appeal.

• Lord WESTBURY :—It is scarcely necessary to deal with this matter at length, but, to prevent miscarriage, we will make a few observations upon it.

In the court below, it appears that there was an information and bill filed, several persons being plaintiffs in the bill, and the information also being by the Advocate General at the suit of certain relators. Their information and bill were both dismissed, and an application is now made by two gentlemen, one of whom was a defendant in the cause, and the other

(a) Present : Lord WESTBURY, Sir J. W. COLVILLE, Sir E. V. WILLIAMS, Sir LAWRENCE PEEL.

a stranger, for this extraordinary purpose. It appears that an application was made by them in the court below to have the carriage of the cause so far as the Advocate General was concerned, and to have leave to present a petition of appeal. That application was a mistaken one, because the appeal could hardly, under the circumstances, be the appeal of the Advocate General alone. It ought to have been the appeal of the Advocate General and of the plaintiffs. However, the Court thought fit, upon certain terms being complied with, with regard to the payment of costs and the security for costs, that the conduct of the matter for the purpose of an appeal by the Advocate General should be given to the then applicants. Minutes were directed to be drawn up accordingly, but before these minutes were matured into an order, the Court, reflecting on the matter, thought proper to intimate to the Registrar that the order in some particulars was not to be drawn up, and that other directions should be substituted for those that were originally given by the Court in the matter when it first considered it. It is very competent to a Court of Equity to do that. It is done frequently, and it would be very unfortunate if there were any impediment in the way of its being done.

These petitioners, however, have conceived this monstrous and strange conception, that they have a right to come to this tribunal, and ask to present an appeal for the purpose of compelling the order being drawn up in conformity with the original opinion of the Court, and not in conformity with its amended judgment. That is a proposition incapable of being maintained, independent of the insuperable difficulty arising from the fact that the petitioners have no *locus standi* except that which should be conceded to them by the Advocate General. Now it must never be forgotten that it is the right of the Advocate General, and his duty, to intervene at any time, and if he thinks fit to take away the conduct of the matter from the relators he has a perfect right to do so; and the relators have no power at any time to take any step in the cause against the will of the Advocate General. Now the Advocate General has intimated his opinion that the present applicants should have no power to carry on the matter unless they complied with the terms prescribed by the Court in its amended judgment. They come here, in the absence of the Advocate General, to ask us to give them leave to appeal from that, and to cause the Advocate General to abide by the original, and apparently improvident, opinion of the Court. Such an application is quite unprecedented.

Now it is put to us in an amended form here that the decree is one from which the party has a right to appeal, and it is desired that we should give him liberty to appeal. If he desires such liberty, it must be only in his character of defendant. He cannot have liberty to appeal in the name of the Advocate General and in the name of the plaintiffs. If he desires to appeal, and conceives that he can bring forward the merits of the case upon his own appeal, let him apply in the ordinary form to the court below for leave to appeal.

The whole matter, as far as the application is directed to presenting an appeal in the name of the Advocate General and in the name of the plaintiffs, is a thing quite unheard of, but if one of the petitioners who is a defendant thinks proper to apply to the court below for leave to appeal, he will be perfectly at liberty to do so.

Mr. *Anstey* :—Will your Lordships add, “ notwithstanding that the time has elapsed ? ” Lord *WESTBURY* :—Certainly not. We will not do or say anything which can be construed into an order beyond this, that we dismiss the petition.

*Petition dismissed.*

H. D. Aulbep

CASES  
DECIDED IN THE  
APPELLATE CIVIL JURISDICTION  
OF THE  
HIGH COURT OF BOMBAY.

Special Appeal No. 294 of 1865.

1867.  
October 9.

KRISHNARA'V GANESH..... Appellant.  
RANGRA'V and another ..... Respondents.

Inám—Alienation—Construction—Reg. XVII. of 1827—Reg. VI. of 1833—Act XI. of 1843—Act XI. of 1852, Bom. Acts III. and VII. of 1863.

A grant, in inám-i-altamghá, to N. and his children “and their descendants in lineal succession, for generation after generation, in perpetuity and for ever,” which was unburdened with any condition as to prospective service, and free from any religious, charitable, or other trust. Held to confer an alienable estate.

Grants of land revenue for religious and charitable purposes, or for the future rendition of civil or military service to the State, considered, and to some extent classified; and the Enactments and authorities, historical and legal, relating to the question of their alienability, mentioned.

THIS was a special appeal from the decision of A. Bosanquet, Acting Judge of the Ahmednagar District, affirming in appeal the decree of the Principal Sadr Amín of Ahmednagar.

The facts are fully stated in the judgment.

The case was argued before WESTROPP and TUCKER, JJ.

Howard and Shántarám Náráyan, for the appellant, contended that, under the sanads creating the inám, Ganpatráv Náráyan, the adoptive father of the appellant, could not alienate or encumber it beyond his lifetime.

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*Reid* and *Dhirajtál Mathurádás*, for the respondents, contended that this was an inám free of conditions or restrictions, and therefore alienable; and that it had been well alienated before the adoption of the appellant. They cited *Rajah Nursing Deb v. Roy Koylasnath* (a), S. A. No. 417 of 1863 (b), and S. A. No. 791 of 1864 (c).

*Cur. adv. vult.*

WESTROPP, J.:—This action, instituted on the 29th of April 1861, was brought by the plaintiffs, the present respondents, in special appeal, to recover 360 bighás of lands situated at Susrá, in the division of Shivgaum and district of Ahmednagar, from the defendant, the present appellant in special appeal, together with Rs. 3,240, eight years' mesne profits thereof, and Rs. 500, damages for waste alleged to have been committed by the defendant, in cutting down certain trees growing upon the same lands.

By a farmán under the royal seal of Sháh A'lám, bearing a date similar to the 28th of January 1771, the village of Susrá, then estimated to be of the annual value of Rs. 2,700, was given "as a royal grant in perpetuity [inám altamghá], free of tax, to Náru Ganesh, together with his children, without restraint by any person," from the beginning of the harvest-time of the Fasli year 1180 (A.D. 1770-71). The farmán then proceeded thus: "It is necessary that the renowned and powerful children of our illustrious house, and the worthy ministers and dignified nobles, and munificent governors and government officers who economise [the revenue], and the managers of civil affairs, and the custodians of the state business, and the jágirdárs and the tax-collectors of the present and future times, always and for ever, having exerted themselves for the permanent observance and execution of this hallowed and exalted ordinance, shall give up the abovementioned village to the possession of them [meaning Náru Ganesh and his children], and their descendants in lineal succession, for generation after generation, in perpetuity and for ever; and, regarding them as safe,

(a) 9 Moo. Ind. App. 55. (b) *Pest*, p. 21. (c) 2 Boni. H. C. Rep. 18.

and protected from the misfortunes of transfer and changes, shall not molest them, nor ask for presents (peshkash) for those newly appointed to the office of Súbedár (governor of a súbá), and the office of Foujdar," &c.; here followed several species of fees and taxes which were not to be demanded of the grantee or his descendants; and the farmán then continued thus: "In this matter, considering this as binding and most stringent, no demand for a new grant (sanad) is to be made annually."

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A sanad in the Maráthi language and Bálbodh character, dated the 28th of February 1821 (Fasli 1230), from Captain Henry Pottinger, then Collector of the Súbá of Ahmednagar on behalf of the East India Company, to Ganpatráv Náráyaṇ, son of Náru Gaṇesh, recited a petition of Ganpatráv Náráyaṇ, which mentioned the farmán of the 28th of January 1771, as "made out and granted by Sháh A'lám Pádiháh Gázi, in the name of (or to) my father, Náru Gaṇesh, for granting (to him and his) sons, grandsons, and other descendants from generation to generation," the village of Susrá, and proceeded thus: "I have enjoyed the same, and pray that it may be continued [to me] for ever in future also, and that a fresh sanad may be made out and granted by the Sarkár." The operative part of the sanad was as follows:—"Now the mahál has come under the rule of the Sarkár; and as it is our intention to do you the favour to continue [the same to you], your enjoyment of the same under the former farmán having been taken into consideration, a sanad has been granted, by virtue of an order received from the Huzúr at Puná, [directing] that the rights to the aforesaid village be confirmed and granted by the Company's Sarkár to you, and a sanad be written out and granted agreeably to what is mentioned above; (you, your) sons, (and) grandsons from generation to generation, are to enjoy the same and live happily. In every respect you are to attend to (the wishes of) this Sarkár, and to act (accordingly). Be (this) known (to you)."

That sanad evidently was intended to be, and amounts to, no more than a confirmation of the farmán of 1771.

**1867.** **KRISHNARÁV GANESH v. RANGRAV et al.** Ganpatráv Náráyan, on the 10th of Ashvin Shud, Shake 1747 (21st October A. D. 1825), conveyed 240 bighás, part of the lands of Susrú, and on the 5th of Mágśar Shud, Shake 1748 (4th December A. D. 1826), 120 bighás, a further part of the same lands, to A'mbádás Nathuji, the grandfather of the plaintiffs, for valuable consideration. The 240 and 120 (in all 360) bighás thus conveyed to A'mbádás Nathuji were, from the dates of the respective conveyances to him, enjoyed by him until his decease in 1850, and afterwards by the plaintiffs until the 31st of March 1852, if not later.

At the dates of the respective conveyances of 1825 and 1826 to A'mbádás Nathuji, the grantor, Ganpatráv Náráyan, was without issue. Ten years afterwards, however, A.D. 1836, he, with the assent of Government, adopted the defendant, Krishnaráv Gañesh.

Some time subsequently to March 1852, the plaintiffs, being then minors, seem to have been deprived of possession. The elder of the plaintiffs attained his majority in 1855, and the younger attained his majority in 1859. On the 29th of April 1861, they instituted the present suit, to recover possession of the 360 bighás from the defendant, Krishnaráv Gañesh, the adopted son of Ganpatráv Náráyan.

The Principal Sadr Amín, on the 30th of June 1863, decreed against the plaintiffs, on the ground that Ganpatráv Náráyan, the inámdár, had not any power to alienate any portion of the inám lands.

On appeal by the plaintiffs, the Judge (Mr. Richardson), on the 22nd of October 1863, reversed that decree, and remanded the cause for re-trial on certain issues.

On such re-trial, the Principal Sadr Amín decreed that the plaintiffs were entitled to recover the 360 bighás of land, and mesne rates in respect thereof for nine years. He decreed against their claim for damages, in respect of trees, alleged, but, as he held, not proved, to have been cut down by the defendant.

On appeal by the defendant, Krishnaráv Gañesh, against the last-mentioned decree by the Principal Sadr Amín, the

Acting Judge, Mr. Bosanquet, on the 23rd of February 1865, affirmed that decree with costs.

The defendant, Krishṇarāv Gāñesh, has since filed the present special appeal against the two last-mentioned decrees.

The hearing of that appeal took place before Mr. Justice Tucker and myself.

The only question raised in the argument before us was, whether Ganpatrāv Nāráyan, being an inámdár, could alienate the lands in dispute, which formed part of his inám, for any period exceeding the term of his life.

The original grant (A. D. 1771), by Sháh A'lám, was of an altamghá inám.

Professor H. H. Wilson, in his Glossary (page 19), states that "altamghá" is derived from the Turkish *ál*, red, and *tamghá*, a stamp or impression, and describes it "as a royal grant under the seal of some of the former Native princes of Hindustán, and recognised by the British government as conferring a title to rent-free land in perpetuity, hereditary and *transferable*;" and says that, "although probably originally bearing a red or purple stamp, the colour of the imperial seal or impression became in Indian practice different."

An altamghá inám is not resumable by Government: *Raja Putneemull v. The Collector of Ahmedabad* (d), and *Omar Khan v. Aboo Mahomed Khan*. (e) Dr. Lushington, in his judgment in a case reported in 7 Moore's Indian Appeals, page 132, describes such an inám as "a grant in perpetuity, not resumable." The case of *The E. I. Co. v. Syed Ali* (f) cannot be taken as an authority to the contrary, as the East India Company treated the sanads or parwannas, there relied upon, as grants in *jágír*, and not in altamghá (g), and by their letter to the Board of Revenue seem to have admitted that altamghá rents could not be resumed (h). The Privy Council upheld the resumption which had been made in that

(d) 3 Macn. S. D. A. Rep. 304. (e) *Ibid.* 179, 194.

(f) 7 Moo. Ind. App. 555. (g) *Ibid.* 558.

(h) *Ibid.*, 557, 558.

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case, on the special ground that it was an act of sovereignty authorised by treaty. The East India Company subsequently re-granted the lands as a jágir to the heir for life.

It has been decided that an altamghá inám is partible : *Omar Khan v. Aboo Mahomed Khan.* (i)

Wilson describes “Ináám-i-altamghá” as “A grant of rent-free land under the royal seal” (page 218).

Of “Ináám” (or vernacularly inám) he says that it is “A gift, a benefaction in general, a gift by a superior to an inferior. In India, and especially in the south and amongst the Maráthás, the term was especially applied to grants of land held rent-free, and in hereditary and perpetual obligation ; the tenure came in time to be qualified by the reservation of a portion of the assessable revenue, or by the exaction of all proceeds exceeding the intended value of the original assignment ; the term was also vaguely applied to grants of rent-free lands, without reference to perpetuity or any specified conditions. The grants are also distinguishable by their origin from the ruling authorities, or from the village communities, and are again distinguishable by peculiar reservations, or by their being applicable to different objects” (page 217). And see also Steele’s Law and Custom of Hindú Castes, page 206, para. 2, and pages 212, 227, 229, 235, 277.

Those originating from the State, Wilson styles “Sanadi-Ináms” (to which class the grant to Náru Gañesh in 1771 belongs) ; those from the village communities he styles “Gáon nisbat Ináms.” Of the latter genus he enumerates seven different species, to which it is unnecessary that I should make any further reference.

Professor Wilson also mentions another classification of Maráthá inám lands, under six heads, the first of which he subdivides into seven species.

It is, however, more convenient for the purposes of this judgment to divide ináms originating from the State into two principal kinds, viz. : 1st, Those which are denominated

(i) 3 Maen. S. D.A. Rep. 179.

chákariá, and held on the condition of performing some office or service, or discharging some obligation or trust, or which, if the duty or trust to be fulfilled be charitable or religious, are frequently described (and more especially where the grants or alms are given by or to Muhammadans) as khairát or khayrát; (j) 2ndly, Those which are unencumbered by any such burden, condition, or liability. (k)

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Sanadi grants in inám, saranjám, jágír, wazífa, wakf, devasthán and sevasthán,\* are, generally speaking, more properly described as alienations of the royal share in the produce of land, *i.e.*, of land revenue, than grants of land, although in popular parlance, and in this judgment, occasionally so called. (l)

Grants of ináms for religious or charitable purposes are frequently found to be of great antiquity, and evidenced by inscriptions on copper-plates. Instances, and translations by the late Bál Gangádhar Shástri, of such inscriptions have been published in the Journal of the Bombay Branch of the Royal Asiatic Society. (m) Generally such grants are held in perpetuity (n), and cannot be aliened or incumbered; and this is so whether they are Hindu (devasthán or sevasthán) or Muhammadan (wakf or wazífa) (o): Wilson's Glossary, 217, Title "Ináam," "Devasthán;" Steele, p. 237; 2 Macnaghten's Hindú Law 305; *Bowancee Pursad v. Ranee Jugudumba* (p); Elberling, para. 270, p. 127; *Syed Hoosein Ali v. Ravi*

(j) Wilson's Glossary, 97, 274; 2 Malcolm's Central India, 28, 74, 3rd ed.

(k) Morris, Pt. III., p. 22, note.

\* See "Swasthan," "Swasthyam," Wils. Gloss., pp. 496, 594; "Suwasthan," Elph. Rep., Appendix xxvi.; "Sumusthan," Steele., pp. 209, 228.

(l) Elphinstone's History of India, p. 74, 4th ed.; Elphinstone's Report on the Territories conquered from the Peishwa, pp. 20 to 25, and App. xxvi., reprinted at Bombay in 1838; 2 Morris Bom. S. D. A. Dec. 214.

(m) No. V. April 1843, pp. 200, 216; No. VIII. Oct. 1844, p. 1; No. X. July 1845, pp. 263, 270; No. XI. July 1847, p. 371; and see No. VI. Oct. 1843, 262.

(n) Elph. Hist. 77; Elph. Rep., App. xxvi., xxvii.; Steele, p. 235; Male. Cen. Ind. 74.

(o) As to Wazífa see Selections from Bombay Government Records, New Series, No. XXX., pp. 92, 95.

(p) 4 Macn. S. D. A. Rep. 343.

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Reg. XVII. of 1827, Sec. xxxviii., cl. 2 (Bombay), enacted that "all land held exempt from the payment of public revenue, if such exemption was granted in consideration of service to be performed, or for the support of religious or other establishments, or for other special purposes, shall be liable to be assessed, if the conditions of the grant are not fulfilled."

That enactment, however, formed part of Chap. 9 of Reg. XVII. of 1827, which chapter and Chap. 10 are repealed by Bombay Act VII. of 1863, Sec. 1 (see also Sec. xxxii., cl. F), an Act applicable only to such parts of the Presidency as Act XI. of 1852 did not govern.

Act XI. of 1852 applies only to the Dakhan, Khándesh, Southern Maráthá Country, and other districts more recently annexed to the Presidency of Bombay. Its Schedule B, Rule 7, provided that inám land held for the support of mosques, temples, or similar institutions should be permanently continued. Bombay Act II. of 1863 applies to the same territories. Sec. viii. (cl. 1 and 2) provides for

(q) Selected Cases (Bombay S. D. A.) No. 52, p. 231.

(r) 2 Maen. S. D. A. Rep. 110. (s) 2 Mad. H. C. Rep. 19.

(t) 2 Moo. Ind. App., 390; and see 3 Maen. S. D. A. Rep. 407.

(u) See 2 Moo. Ind. App., p. 408, for the form of the sanad.

the permanent continuance of such ináms, and (cl. 3) that they shall not be transferable by assignment, sale (judicial, public, or private), gift, devise, or otherwise however, or liable to nazzarána.

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That Bombay Act VII. of 1863 contains no similar provision, may possibly be due to the fact that in some few places in the territories to which it applies, *e.g.*, Broach and Surat, it seems that by local custom, contrary to the general law, lands held for Muhammadan religious purposes have been treated as alienable: *Fatima Beebee v. Moolla Abdool Futteh* (*v*), *Abbas Ali v. Ghoolam Mahomed* (*w*). I have not found any decision to the effect that amongst Hindús in those districts a similar variation exists. The question appears to have been raised, but not decided, in *Mathuradass v. Lal-dass* (*x*). Steele states that the lapse of twenty years validated the misappropriation of devasthán lands (*y*); and (p. 237) that an aged or infirm incumbent incapable of performing the duties of the endowment may alienate for ever, unless the heir protest at the time, subject to the performance of the religious services by the new acquirer. But this latter proposition appears to be lax doctrine, and should be received with caution.

Lands held in saranjám were revenue-free, and were held for the performance of military service (either personally or by the support of troops), or of other state service; yet as they were generally resumable at the pleasure of the sovereign, or bestowed upon the grantee for his life only, such lands can rarely, if ever, be classed as inám proper (*z*).

It is seldom, though in some few instances it may be, difficult to draw the line of distinction between jágír and inám. That difficulty would arise where the jágír has been made, or suffered to become, perpetual. A jágír, like an inám, was conditional (*a*) or unconditional. But unless

(*v*) 1 Borr. 124; but see 2 Borr. 741. (*w*) 1 Bom. H. C. Rep. (Dunbar) 36.

(*x*) 1 Morris S. D. A. Dec. 35. (*y*) p. 207, para. 3.

(*z*) Wilson's Glossary 465; Elphinstone's History of India, 74; Steele, p. 208, para. 7; and page 227. But see 2 Borr. 501.

(*a*) See Mr. Mountstuart Elphinstone's Evidence before a Select Committee of the House of Lords, 26th March 1830, page 307, pl. 2469, 2470, 2471, *et seq.*

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 et al. specified to be hereditary, it was a life-tenure only (b), although not unusually renewed to the heir of the grantee. Some jágírs, Professor Wilson says, have been converted into perpetual and transferable estates (c).

As a rule, military jágírs were feudal in their character. With respect to them Mountstuart Elphinstone, in the appendix (d) to the first four books of his History of India, says : "Lands held for military service are subject to reliefs in the event of hereditary succession, and to still heavier fines when the heir is adoptive. They are subject to occasional contributions in cases of emergency. They cannot be sold or mortgaged for a longer period than that for which the assignment (grant) is made. Subinfeudations are uncommon, except amongst the Rájputs, where they are universal." In his evidence before a Select Committee of the House of Lords on the 25th and 26th of March 1830, Mr. M. Elphinstone (pl. 2300 and 2466) states that jágírs revert to Government on failure of heirs of the grantee, and are even resumable at his death at the pleasure of Government. That (pl. 2466) under Native governments military jágírs "are not in general so resumed, because the same motive for keeping troops up continues to exist that existed when the jágírs were granted." That (pl. 2467) under his government "all the jágírs in the Maráthá Country for the maintenance of troops were resumed at the conquest, that portion only being left which was for the maintenance of the chief himself and his immediate followers. When the chief was not a member of a family of consequence, or where there was no other motive for keeping up the allowance, the jágír was resumed at his death. The Native governments frequently resumed even during the life of a jágirdár, when they were offended with him." Mr. Elphinstone did not recollect any resumption during the lifetime of the jágirdár since the first conquest from the Maráthás (pl. 2468). In the old British territory, he

(b) *Collector of Bareilly v. Martindell*; 2 Macn. S. D. A. Rep. 188; Wilson's Glossary, page 224; 2 Malcolm's Central India 56, 3rd ed.

(c) Wilson's Glossary 224; and see 3 Grant Duff's History of the Maráthás, pp. 351, 353.

(d) p. 251, 4th ed.; see also pp. 74 to 77.

said (pl. 2469), the question of resumption was in each case considered on its merits; but that as to the Dakhan, when leaving it for Bombay, he sent in a list of jágírdárs, with a recommendation specifying which should be perpetual, and which should be resumed and on what occasions; the principle on which he acted being, that all jágírs "granted by the Great Mogul or the Maráthá Rájas, and all which belonged to very old families under the Peishwás, should be perpetual" (pl. 2470).

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Bombay Reg. XVII. of 1827, Sec. XXXVIII., cl. 1, and Reg. VI. of 1833, Sec. I., cl. 3 (the curious history of which latter enactment, as given by Mr. Hart, may be found in the Selections from the Records of the Bombay Government, New Series, No. XXX. (e),) rendered jágírs resumable at the pleasure of Government (f). Bombay Act VII. of 1863, Secs. II. and XXXII., cl. C and D (which applies to the whole of the Bombay Presidency except the Dakhan, Khándesh, the South Maráthá Country, and other places governed by Act XI. of 1852), repealed Bombay Reg. XVII. of 1827, ch. IX. and X., and Bombay Reg. VI. of 1833, but declared that lands held as saranjám, or on similar political tenure, and lands held on service, shall be resumable or continuable at the pleasure of Government.

As to civil hereditary offices, and the ináms (watan) annexed to them, the balance of authority seems to incline in favour of the alienability in permanence (*previously to British legislation*) as well of the offices as of the ináms appendant to them, together or separately: (Mountstuart Elphinstone's Report on the Territories conquered from the Peishwa (g); and his History of India, Book II., Chap. II. (h); *Janardhun Ganesh Gogte v. Krishnaji Wassodev Kenvinday* (i); *Sakhamaram Govind v. Shriniwasrao Venkatesh* (j); and *Haribhai v.*

(e) pp. 142 to 144.

(f) See Act XI. of 1852, Schedule B, Rule 10; Bombay Act II. of 1863, Sec. I., cl. 2, Sec. XVI., cl. C and D.

(g) p. 16, and Appendix (letter from Capt. Briggs), page x., and (letter from Capt. Grant) pp. xv. and xvi., Bombay reprint of 1838.

(h) pp. 64, 72, of the 4th ed. (i) 2 Borr. 615.

(j) 2 Morris S. D. A. Dec. 26.

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*Sunderji (k).* In *Parvati v. Sooruj (l)* both the plaintiff and the Court assumed that a desáigirí's mortgage would bind his heirs. The plaintiff, by her plaint, filed in A. D. 1819, only asked for, and the Court only decreed, recovery of the mortgage lands on payment of the balance of the mortgage-money remaining due. It was admitted in *Amrootram v. Narayendas (m)* that a Mujmoodar might, as against his heirs, charge his watan with encumbrances; the only question there made was whether his widow might do so likewise. In the case of some, but not of all, such offices, the assent of the Native government seems to have been necessary to the validity of the alienation (n), and also, if the watan were undivided, the assent of the coparceners, if any: Steele, page 210, para. 56, and pages 236, 237, para. 77.

In *Baee Rutton v. Munsooram (o)* (decided in 1848), a conclusion unfavourable to the validity of a mortgage, made in 1819, of a desáigirí watan seems to have been arrived at. And in the case of *Balaji v. Nago (p)*, decided in 1860, it was held that an assignment of mirás and inám land made in the Shake year 1740, which formed part of a service watan, to an illegitimate son of the proprietor, was void as against the legitimate heirs. There do not, however, appear to have been any authorities quoted in either of those cases, and in both of them the alienation occurred before the Regulation, to which I shall next refer, had become law.

Bombay Reg. XVI. of 1827, Sec. xx., cl. 1 and 2, prohibited alienation, by any hereditary officer, of his official emoluments, and directed that such official emoluments enjoyed by a co-sharer should not leave the family in which the office is vested. That Regulation, it has been held, prevents the attachment of the inám lands appurtenant

(k) 2 Morris S. D. A. Dec. 29. (l) 2 Borr. 563.

(m) 2 Borr., pp. 223, 227.

(n) See the references in the above notes (z) and (a) to Elphinstone's History and Report.

(o) Bellasis, p. 93. And see Mr. Frere's Minute, 2 Morris S. D. Dec., p. 30, note.

(p) 7 Harington Bom. S. D. A. Dec., p. 124.

to a deshmukhi and pátelki watan in respect of a deceased watandár : *Kunialall v. Wiswasrao* (q).

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The prohibition against alienation, however, according to the interpretations of that Regulation made by the Sadr Adálat on the 23rd of February 1831 and the 5th of December 1834, did not extend to an alienation for any period not exceeding the lifetime of the watandár (the incumbent).

Act XI. of 1843, for regulating the service of hereditary officers in this Presidency (Section 13), enacted " that nothing contained in " that Act " shall be construed to debar the right of any sharer to participate in the rents and profits of any hereditary office (r) so held and filled as above provided, after provision shall have been made therefrom for the maintenance of the officiating hereditary officer, for which purpose it shall be competent to the Collector or controlling officer to fix and assign a specific portion of such rents and emoluments, leaving the remainder only subject to the claims of the other sharers ; and further, that the portion of the rents and emoluments so fixed and assigned shall be the official remuneration (s) of the officiating hereditary officer, and shall not be liable to civil process of any court of law." Upon that section a conflict of opinion and decisions seems to have arisen in the Sadr Adálat. In *Jewajee Gungadhur v. Shamrao Mahadeo* (t), decided in 1850, the surplus of the watan beyond that portion of it which the Collector had set apart for the officiating hereditary officer, was held to be partible ; such partition, however, to be subject to any further provision which the Collector may make out of the watan for the maintenance of the officiating hereditary officer. In *Haribhai v. Sunderji* (u), in April 1855, Mr. Frere recorded a minute substantially to the effect that as Act XI. of 1843, Sec. 13, rendered the surplus watan partible amongst the family of a deceased watandár, it neces-

(q) Morris, Pt. III., p. 4.

(r) See also Act XI. of 1852, Schedule B, Rule 8, as to the permanency of lands held on official tenure.

(s) See 3 Morris S. D. A. Dec. 242.

(t) Morris, Pt. II., 110.

(u) 2 Morris S. D. A. Dec. 29.

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sarily was alienable to strangers also. Looking, however, to the 9th and 12th sections of that Act, authorising Government, in the event of fraud or malversation of the hereditary officer or his deputy, to confiscate the whole watan, and to dispose of the surplus proceeds as it pleases, and to the possibility of the Collector's varying from time to time the proportion of the watan assigned to the officiating hereditary officer or his deputy (if such a variation be allowable), it seems difficult to hold that Sec. 13 authorised any alienation of the surplus proceeds. In *Haribhai v. Sunderji* the Court did not act upon Mr. Frere's view of that enactment, but upheld the alienation, on the ground that it took place before Reg. XVI. of 1827. Yet, in *Jesingbai v. Baee Jeetawowoo* (v), decided in June 1855, the same Court did adopt his view of Act XI. of 1843, Sec. 13, and held that the surplus proceeds of a pátelki watan were alienable. A like decision was made as to the surplus proceeds of a desáigirí watan of the pasaetun kind in *Sobharam v. Sumbhooram* (w), a strong decision if the definition of "pasaetun" given in the note to that case be correct, viz., "land free from revenue in lieu of service, the usufruct, but not the property, of which is assigned to, and enjoyed by, village officers." However, it seems now to be rightly settled by *Lukshumun Kalapa v. Sadooba Baluná* (x), decided in 1861, that Reg. XVI. of 1827, Sec. xx., has not been in any wise affected by Act XI. of 1843, and, therefore, that a mortgage, made in A.D. 1838, by one of the coparceners in the surplus proceeds of a service watan, could not be upheld after the decease of the mortgagor. That case was decided by Messrs. Keays, Hart, and Hebbert.

In *Wittul Sakaram v. Bhageerthabae* (y) a mortgage of an inám izáfut village of Ambágaum, appendant to the hereditary office of deshpándé, executed in A.D. 1829 by the watan-dár to the defendant, was held to be of no force after the death of the mortgagor.

(v) 2 Morris S. D. A. Dec. 131.

(w) 3 Morris S. D. A. Dec. 242. (x) 8 Harington S. D. A. Dec. 56.

(y) Bellasis R. 63.

It could not much surprise a person unacquainted with the subject, to find that ináms appendant to hereditary offices were always inalienable. The purpose for which such ináms were granted, namely, to ensure to the officer the proper means to perform his duties with efficiency and dignity, would naturally lead to that conclusion.

Nevertheless, of the authorities, historical and judicial, which have been quoted (and I am not aware that I have omitted any reported decisions), the balance appears to incline very decidedly in favour of the opinion that, *previously to Reg. XVI. of 1827*, such ináms were generally alienable.

If, previously to legislation to the contrary, ináms annexed to hereditary offices, that is to say, service watans, were alienable, it seems that *à multo fortiori* should ináms which are not chákariá, and to which no trust or conditions of service, or other restrictions, are attached, be alienable, in the whole or in part, at the pleasure of the inamdar.

Professor Wilson, we have seen, treats a grant in altamghá inám as generally both hereditary and transferable.

In the appendix to Elphinstone's Report already referred to, it is stated that, in Khándesh, ináms were "everywhere saleable."

From p. 208, para. 2, and p. 227, para. 68, of Steele, it would appear that the Native government regarded ináms as alienable, but levied discretionary nazzarána upon alienations.

In *Venakrao Narayen v. Purushram* (z), decided in 1846, by the same court which held that an inám izáfut annexed to the office of deshpánde was not alienable, it was held by Mr. Bell and Mr. Hutt, against Mr. Gregor Grant, that a decree obtained against a deceased inamdar, in his lifetime, who held his inám without conditions, entitled the judgment creditor as against the heirs of the inamdar to attach the inám. That decision was made in affirmance of the decision of Mr. Hebbert in the court below. The terms of the grant there, were, to the grantees "and their family from generation to generation."

(z) *Bellasis R.* 61.

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In *Duttō Essajee Patil v. Mulkappa Mullappa Patil* (a), which was the case of mirás, not inám, land, the Court being of opinion that, though it belonged to an hereditary officer, it was not appurtenant to his office as chákariá or service land, upheld a mortgage of the mirás land against the heir of the mortgagor.

In *Dhond Busunghonda v. Venkutramacharee* (b), a lease to the appellant, for so long as he chose to hold, of a field, part of a *sarv inám*, was held good, after the decease of the inámdár (lessor), against his heirs.

In *The Collector of Surat v. Ghelabhai Narrundass* (c), it was held (in affirmance of a decision by Mr. Hebbert) by Mr. K. Forbes, Mr. Hart, and Mr. Newton, against Mr. Keays, that a mortgage by an inámdár of an inám, not granted on chákariá tenure, was good after his death without heirs, notwithstanding the escheat of such estate as remained in the inámdár to the Crown, and that the mortgagee was entitled to hold the land revenue-free until redemption of the mortgage. The Court was of opinion that such an alienation is valid, in the absence of anything to show that the tenure of the inámdár, from whom the mortgagee derived his title, was one which restricted the continuance of the inám to the duration of any particular family, or any local custom or law prescribing such restriction. No person in this Presidency had a more extensive knowledge of ináms, or a more familiar and thorough acquaintance with their nature, than Mr. Hart.

*Vishnu Trimbuick v. Ramkrishna Tatic* (d) was, to a certain extent, a similar case. An inámdar, in the Puná zillá, having executed a mortgage, died in 1829, without natural-born heirs of his body, but leaving an adopted son, Jánárdan. The mortgagee obtained, in 1833, a decree upon his mortgage against the widow of the inámdár, and

(a) Bellasis R. 88. See, as to the alienability of mirás land, 1 Grant Duff's Hist. 22; 2 Morris S. D. A. Dec. 188, 189; Elph. Rep., App. xxiii. xxiv.; but as to Khándesh, *ibid.* xiv.

(b) Morris, Pt. III., p. 132. (c) 9 Harington S. D. A. Dec. 603.

(d) 1 Bom. II. C. Rep. 22.

Janárdan. Subsequently, the Inám Commission having declared that the inám had lapsed, for want of natural-born heirs of the body of the inámdar, Government resumed the inám, but permitted Janárdan to continue as tenant, under Rule 6 of the Government Circular No. 2449 of 1854, paying the usual revenue to Government. It was held that the lands in the hands of Janárdan were liable to the mortgage, a decision which could only have been arrived at upon the understanding that the inámdar had power to charge the lands as against his heirs. That case was decided by Sausse, C.J., and Kinloch Forbes and Warden, JJ.

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In *Bhowanee v. Hussun Miya* (e), a roosoom, or annual rent charge of a hundred years' standing, created by a former inámdar, was, by the majority (Forbes and Newton, JJ.) of the Court, held to be a valid charge upon the inám.

In 1864, Couch and Newton, JJ., in *Sultánji Trimbaikji Pátel Sirvale v. Raghunáth Rámchandra* (f), compelled the specific performance of an agreement, by an inámdar, to assign a third part of his inám in perpetuity to the plaintiff in consideration of services rendered in assisting the inámdar to recover the inám. The District Judge of Puná had also so decreed, and one of the points made on special appeal against his decree, but overruled by the High Court, was, "that the inám, having been granted for the support of the entire family, any one member of it has no right to alienate any portion of it, for any purpose whatever."

It was contended, in the present case for the appellant, that such words of inheritance as are found in the farmán of 1771 operate as a species of entail, and therefore that *per formam doni* the grantee and his heirs were prevented from alienating the inám. The phrase "entail" was used not in its technical English signification, or as involving any rights in respect of primogeniture, but to indicate that none but the grantee or his descendants could hold the estate granted. The grant is to Náru Gañesh and his children, "and their descendants in lineal succession, for generation after generation, in perpetuity and for ever."

(e) 1 Bom. H. C. Rep. 45. (f) 2 Bom. H. C. Rep. 48.

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In *Rajah Nursing Deb v. Roy Koylasnath* (g) a sanad khooro poos (deed of maintenance) by a zamindár, conveying villages and lands, part of the zamindári, to A, as the head of a branch of the grantor's family, in lieu of maintenance, to which A was entitled out of the zamindári, "to hold and enjoy possession from generation to generation," subject to an allowance for maintenance to a certain class of the family described as lowahokans and motalokans (dependants and relations), it was held: *1stly*, That, in the absence of evidence of any class of persons answering the description of lowahokans and motalokans (which might have created a trust), A took an absolute estate in the lands and villages assigned to him; and, *2ndly*, That the limitation in the sanad, "from generation to generation," did not create such an estate as to bar alienation. Knight Bruce, L.J., said that their Lordships "do not collect from the instrument an intention that from son to son it should remain in the family, with the head of the family for the time being, in order to enable him to afford the maintenance;" and again, after referring to the words at the end of the instrument, "continue to hold and enjoy possession to us uninterruptedly from generation to generation," he said: "Every part of that portion of the deed appears to their Lordships to refer to the enjoyment of the land, and not the identity, or the persons, or the continuance of the persons of those who were to be maintained."

The farmán of 1771, in the present case, is much stronger in favour of alienation than the sanád in the case last mentioned, there being in the former a complete absence of aught importing a trust, or relating to maintenance of the grantee or his family.

The Privy Council, in 1856, overruling a decision of the Governor in Council, held that a grant, in 1823, of villages to Hanmant Ráv, by the Bombay Government, which provided that "he and his sons and sons' sons should enjoy the same, in male line, all succeeding generations, in inám," did not take the inám villages out of the general principles of the

(g) 9 Moo. Ind. App. 55.

Hindú Law respecting partition : *Bodhirao Hunmant v. Narsing Rao.* (h)

Where the Will of a Hindú contained a bequest of ten rupees per mensem followed by this direction : " In this manner continue to pay in the legatee's name *so long as he shall be alive*; after his death continue to pay the same from generation to generation," the High Court of Madras held that the first legatee took only a life interest in the bequest, and that the descendants in existence at the time of his death, took absolutely as a class, and that nothing in the nature of an entail was created by the words " from generation to generation," those not being technical words, and, when used by themselves in Hindú documents, not importing, in their ordinary signification, more than " absolute" or " for ever," or " while the sun and moon endure :" *Arumagam Mudali v. Ammi Ammal.* (i)

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In the recent case of *Oomuttoonissa Beebee v. Areefoonissa Beebee* (j), where a Muhammadan testatrix devised her estate to her nephew, Muhammad Hasen, *nuslun bad nuslun, battan bad battan*, it was held that, notwithstanding those words, the devise lapsed on the death of the nephew, which occurred before that of the testatrix, and that, accordingly, on her death, his son did not take the estate under the Will. The Court said : " We think that the devise to Muhammad Hasen was absolutely to him, and that the words quoted simply gave him full power over the estate, and do not extend the devise to his sons in case of his death"— of course meaning his death before that of the testatrix. The same result would follow in England on a devise to A and his heirs, or (unless the Will be regulated by the new Statute, 1 Vic., c. 26, s. 32) to A and the heirs of his body. If A die in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A, takes no interest in the property, he being included merely in the words of limitation, *i. e.*, in the terms which are used to denote the quantity or duration of the estate to be taken

(h) 6 Moo. Ind. App. 426, 429.

(i) 1 Mad. H. C. Rep. 400. (j) 4 Calc. W. R. Civ. Rulings, 66.

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Such words of inheritance are not by any means limited to royal grants or sanads. They are in common use in deeds or writings among the natives of India. For example, in the agreement, the specific performance of which was decreed by Couch and Newton, JJ., the words were, "I will give one-third share of the village to you, your sons and grandsons from generation to generation." (k) A kardapatra or common deed of purchase, given at page vii. of the Appendix to Mr. Mountstuart Elphinstone's Report, to which I have already so frequently referred, contains the following *habendum* : "You will enjoy, you and your sons and your sons' sons to future generations, the land above mentioned." If those words were to be dealt with according to the narrow and literal system of construction which we have been asked to apply to the altamghá grant under consideration, the astonished buyer would find that the estate which he took under his kardapatra, would be more limited in scope even than the estate which the altamghá grant, when literally construed, would carry. That grant, literally read, would include lineal descendants of both sexes. But the words used in the kardapatra, if cut down to their literal sense, and not read as conferring an absolute and alienable estate in perpetuity would not only prevent the buyer from reselling the property, but would, after his death, render it transmissible to his lineal male descendants only, and, if he died without leaving male issue, would exclude alike his daughters and his father from the succession ; and the property would either revert to the vendor, or escheat to the Crown ; although the buyer, no doubt, thought that he, by his purchase, acquired, and the vendor believed that he conveyed, an absolute estate alienable at pleasure and transmissible to the heirs general, male and female, of the buyer in the descending or ascending lines. It is manifest that no court would be warranted in giving the limited interpretation to the words in the kardapatra, and thus defeating the intention of the parties ; and I

(k) 2 Bom. H. C. Rep. 49.

know of no good reason in Hindú or Muhammadan law why to the same or still larger words in an altamghá grant the ordinary and popular construction should not be given.

In his judgment in *Srimutty Soorjeymoney Dossey v. Denobundoo Mullick* (*l.*), afterwards affirmed by the Privy Council, Peacock, C.J., said : " Furthermore, there is no such estate known in the Hindú Law as an estate tail." (See also 8 Moore's Indian Appeals, 66, 87 ; but as to a zamindári estate, see 5 Moore's Indian Appeals, 169.)

At pp. viii. and ix. of the Appendix to Mr. M. Elphinstone's Report, is a remarkable document, an early confirmation by the British Government, called an inámpatra and miráspatra, of a sale, by a pátel, of a part (1½ rukás) of his inám land, and a part (7½ rukas) of his mirás land, concluding thus : " Now you having brought a deed of purchase corresponding with the above statement, and having all produced a document executed by the deceased Bájí Ráv, confirming its validity ; and as you are desirous that the present government should also testify the same, it is hereby decreed, that *you and your sons and descendants* shall enjoy inámpatra and miráspatra the land, &c., according to the tenor of the confirmatory act of the late Bájí Ráv Pandit Pradhan, and that you shall continue to conform to the practices of the village in regard to the lands you have acquired." I cannot suppose that Government intended to create an inalienable estate in the purchaser, enjoyable by him and his lineal descendants only, in the small plots of inám and mirás ground of which the pátel was thus permitted to divest his fief.

A Special Appeal, No. 417 of 1863 (*Gopál Rámji and others v. Dámodar Ganesh*), from Poona, was, on the 4th and 8th of December 1863, heard by the late Mr. Justice Kinloch Forbes and myself. The plaintiffs sued to recover certain ancestral inám land. The principal defendant, Dámodhar Ganesh, proved the sale of the land many years before to him by the ancestors of the defendants, and produced two deeds of sale executed by them, and the original sanad

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dated in the Shake year 1701 (A. D. 1779-80), by the Peishwa's government, granting the inám to the plaintiffs' ancestors, which was made over to Dámodhar on the occasion of the sale. The Assistant Judge, Mr. Melvill, reversing the Munsif's decree in favour of the plaintiffs, decided that the defendant, Dámodhar Ganesh, had established his title, and decreed for him. The first point of special appeal was, that the appellants' ancestors had no right to sell the ancestral inám land. The sanad was to Wálhoji bin Málji Bibwá, their ancestor; it proceeded thus: "Having presented yourself at the town of Puná, before the Huzúr, you represented that you were faithfully performing Government service for a long time; that you were a family man; that, with a view to their maintenance, a sanad was sent to Rájáshri Náru Máhadev, Kamavisdár of, &c., last year, directing him to fix the four boundaries of, and to give to you in new inám, a piece of land, &c., and thereupon he selected a piece, &c. &c." In consideration, therefore, of your services rendered to the State with fidelity for a long time, and in consideration of your being a family man, and feeling that it was necessary to support you, we were pleased to issue a sanad to Náru, &c. directing him to fix the boundaries of, and to give to you in new inám, a piece of land, &c. &c. Having therupon selected the said piece of land, he has submitted a jabta (or defining statement) describing the four boundaries thereof, &c. &c. In all, land measuring, &c., bounded, &c., including, &c. (divers kinds of revenue and taxes), levied at present and leviable, waters, trees, &c. &c., mines and stores, excepting hakdár's dues together with the tijái, is granted to you, as a new inám from the Sarkár: you are therefore to take land at the aforesaid village, measuring, &c., and you and your sons, grandsons, &c., from generation to generation, are to enjoy the inám and live securely. Be it known. The 4th of Jammadi Akhbár. This is the order." The case was argued for the appellants by Mr. Vishnú Moreshvar, and for the respondent by Mr. Dhirajlál Mathurádás, who cited Bellasis R. 61. Our decree was as follows:—"As it does not appear that the inám was granted for any prospective service, or that the grant was burdened with any conditions against

alienation, the Court affirms the decree of the court below, with costs.

The great weight due to the long experience, and profound knowledge of Oriental laws and customs, which so eminently distinguished our late lamented colleague and friend Mr. Justice Forbes, has induced me to give so full an account of that case.

Although the lands in dispute in this case are situated in a district subject to Act VII. of 1863 (Bombay), the alienation by Ganpatráv Náráyan, the inámdár, having taken place long before that Act was passed, and no proceedings having been taken under it with regard to those lands, it does not in any wise govern this case. Lands held in saranjám or on similar political tenure, or for service, are, together with certain others, excepted from the system of adjustment provided by that Act. It is desirable to call attention to the description given in its Glossary (Sec. xxxii., cl. D), and in the Glossary, Sec. xvi., cl. D, of Act II. of 1863 (Bombay), to lands held for service, which excludes "lands granted in consideration of past service only." The interpretation given in these Acts to "lands held for service" is, I think, declaratory only.

Upon a review of all of the authorities, I think that lands held in inám, and especially altamghá inám, such as those the subject of this suit, free from any condition as to prospective service, and unfettered by any religious or charitable or other trust, and not specially restricted to the family of the grantee, are alienable. I cannot hold that the words of inheritance contained in the farmán of 1771 amount to any such restriction, either express or implied. If it were intended that the ináam-i-altamghá thereby granted, and which, I may observe, seems to have been the highest class of estate known on this side of India, were either to be inalienable, or, if alienated, nevertheless to revert to the imperial grantor or his successors upon the failure of issue male, or general issue of the original grantee, it would have been very easy to say so in the farmán of 1771. I should, however, have been surprised to find any such restriction in a grant of ináam-i-altamghá, unburdened by any condition as to service, or by any trust, and solely dictated by a desire to benefit

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the grantee. It would have been inconsistent with, and in derogation of, the nature of such a grant, which usually confers an estate hereditary, transferable, and irresumable. We ought not, unless constrained by force of an overruling context, to endeavour to wrest from language, customarily employed by the natives of India, in their most simple and ordinary conveyances, to import perpetuity of estate, a meaning so narrow and so highly technical as that which the appellant asks us to give to the grant in this case. I cannot find a syllable, in the context of the farmán of 1771, indicating that the words of inheritance were employed in any other than their normal sense. In that sense I read them, and accordingly think that the decree of the District Judge, made on the 23rd of February 1865, ought to be affirmed, and, having regard to the length of possession by the ancestor of the respondents under the conveyances of 1825 and 1826, with costs.

TUCKER, J. :—I have already stated, in Special Appeal No. 211 of 1863, one of the suits known as the Bakshi of Súrat's cases, my opinion that the alienability of land granted as jágír or inám must be governed by the terms of each particular grant; and that no general rule can be laid down with respect to lands granted under these appellations. In the present suit, I agree with my learned colleague in the construction which he has placed on the particular grant under consideration, and in the decree which he proposes to make. I am unable, however, to assent to all that has fallen from him with respect to ináms in general, and more especially with respect to service ináms; nor can I acquiesce in some of the conclusions which he has drawn from a review of the historical authorities and of the judicial decisions which have been cited in the elaborate judgment which we have had the pleasure to listen to; but I am not prepared to, nor is it necessary for the decision of this cause that I should, travel over the same ground, or state in detail the points wherein our opinions diverge. It will be sufficient if it be clearly understood that my concurrence is confined within the limits which I have mentioned.

*Decree affirmed.*

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PA'RVATI' kom DHONDIRA'M ..... *Appellant.*  
 BHIKU' kom DHONDIRA'M ..... *Respondent.*

*Hindú widow—Remarriage—Incontinence—Loss of Caste—Act XV. of 1856—Act XXI. of 1850.*

D., a Pardesi Hindú residing at Násik, died leaving two widows, B. and P. B., who was the first wife, though not incontinent, had been turned out of his house by her husband some time after he married P. by *pát*.

In a suit by B. to recover a moiety of D.'s estate, P., while admitting that she herself had been leading a life of prostitution since D.'s death, resisted a partition of his estate, on the grounds that B. had since D.'s death cohabited with M., and subsequently married with R.—both of which allegations B. denied:—

*Held*, that, though, by Hindú law, incontinence excluded a widow from succession to her husband's estate, yet if the inheritance were once vested, it was not liable to be divested, unless her subsequent incontinence were accompanied by degradation; but that, by Act XXI. of 1850, deprivation of caste can no longer be recognised as working a forfeiture of any right or property, or affecting any right of inheritance.

*Held*, however, also that if B. had duly remarried, she would cease to have any right to recover or hold any part of her late husband's property; and, as the District Judge, on appeal, had left the fact of B.'s remarriage unascertained, that his decree must be reversed, and the case remanded for a finding on that question.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 53 of 1865, reversing the decree of Náráyan Govind, Munsif at Násik.

The facts are stated in the judgment.

The case was argued before WESTROPP and WARDEN, JJ.

Reil and Vishvánáth Govind Cholkar, for the appellant, relied upon Act XV. of 1856, Sec. 2.

Shántárám Náráyan, for the respondent:—Bhikú denies the remarriage, and has done so throughout. The Judge does not find that she has remarried. He must be understood as having determined that she belonged to a caste which may remarry. Such castes do not fall within Act XV. of 1856, which applies only to Hindús who could not remarry. Incontinence subsequent to the death of a

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husband does not divest property once vested in title in the widow, whether or not she were ever in possession.

*Reid*, in reply, cited Steele 170, to show that a widow by remarriage abandons all right to her first husband's property; and as to incontinence 1 Stra. H. L. 136.

*Cur. adv. vult.*

WESTROPP, J.:—This is an action by Bhikú against Párvatí and her father, Mánsing, to recover from them Rs. 2,392, alleged to be the moiety in value of the estate of Dhondirám, deceased.

The first wife of Dhondirám was Bhikú. Subsequently he married, by *pát*, Párvatí, who was then a widow; and about one year and a half afterwards, he turned his first wife, Bhikú, out of his house. The Judge finds that, during Dhondirám's lifetime, Bhikú neither deserted him nor was unchaste. Dhondirám died in Posh, Shaka 1781 (December 1859). The defendant Párvatí possessed herself of his property, moveable and immoveable. Neither of the courts below appears to have found that any case of appropriation of the property of Dhondirám had been established against the defendant Mánsing,

Párvatí (who, the Judge states, admitted that, since Dhondirám's death, she has been living as a prostitute), relying, perhaps, on the maxim *in pari delicto potior est conditio defendantis*, resisted a partition of the property, on the ground that, subsequently to the death of Dhondirám, Bhikú had cohabited with Mirdha valad Náráyáñ (an assertion which does not seem to have been proved), and afterwards married one Rámsing, both of which allegations Bhikú denied.

The Munsif held the marriage of Bhikú to Rámsing to be proved; and therefore that she could not take any share in the property of her first husband, Dhondirám.

On appeal by Bhikú to the Judge of Ahmednagar, he reversed that decree; and held Bhikú entitled to recover Rs. 800, which he found to be a moiety in value of the

property of Dhondirám, which had come to the hands of Párvatí ; and ordered her to pay the costs of the suit.

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Against that decree Párvatí has appealed to this court.

It appears to us that the Judge has not, in his decree, come to any certain finding as to whether Bhikú, subsequently to Dhondirám's death, actually married, or merely cohabited with, Rámsing.

The parties are both Hindús, and Pardesis ; there does not appear to have been any evidence that they were of a caste subject to any special laws or customs as to marriage or succession.

Where there are two widows, who were both the lawful wives of a deceased Hindú, who dies separate and without leaving male issue, they succeed to equal moieties of his property, moveable and immoveable : West and Bühler, Bk. I., pp. 88, 89, 91 ; Mayúkha, Ch. IV., Sec. viii., pl. 9 ; I. W. H. Macnaghten, H. L. 19 ; Steele, p. 43, para. 25, and p. 232, para. 72 ; *Doe d. Baughatty Raur v. Radakisson Mookerjee (a), Rumea v. Bhajee (b), Sree Muttee Muttee v. Ramconny Dutt (c)* ; and see *Rindamma v. Venkataráonappa (d)*.

But if either widow remarry after the death of her husband, she can neither recover nor retain a share of his property. By remarriage she forfeits her right to it. This is so as well by Hindú Law (e) as also by Act XV. of 1856, Sec. 2, in cases falling under that enactment.

If, therefore, Bhikú actually married Rámsing, she must fail in this suit.

But as, upon the Judge's decree, we are unable to say whether she married Rámsing or merely cohabited with him, it behoves us to consider what is the legal result of the incontinence of a Hindú widow, who, as we are bound to hold in the present case, continued virtuous during her

(a) Suppl. to Morton's R. by Montrou, 314.

(b) 1 Bom. H. C. Rep. 66.

(c) East's Notes ; 2 Mor. Dig., pp. 80, 81, 82.

(d) 3 Mad. H. C. Rep. 268.

(e) Steele, pp. 170, 177 ; West and Bühler, Bk. I., pp. 96, 99.

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husband's lifetime, and in whom, accordingly, at his death, a moiety of his property vested in interest, although she has been kept out of possession of it by his other widow.

By the Hindú Law, incontinence excludes a widow from succession to her husband's estate : Mayúkha, Chap. IV., Sec. viii., pl. 2, 4, 8, 9 (f) ; Mitákshará on Inheritance, Chap. II., Sec. 1., pl. 19, 29, 30 (g) ; Daya Krama Sangraha, Ch. I., Sec. II., pl. 3 (h) ; 2 W. H. Macnaghten 20, 21 ; *Doe d. Radamoney Raur v. Neelmoney Doss* (i) ; 3 Colebrooke's Dig., 474, 478, 479, 576, paras. cccv., cccviii., cccix., ccclxvii. Some of the above-quoted writers speak of suspicion of incontinence as sufficient to justify her exclusion. But the better opinion seems to be that nothing short of actual infidelity disqualified : 1 Stra. H. L. 136 ; 2 *Ibid.*, note by Mr. Ellis, p. 271 ; Steele (j), a high authority on this side of India, and Macnaghten (k) speak of adultery or incontinence, and nowhere of mere suspicion of those sins, as affecting the widow's right to succeed to or hold the property of her husband. In *Doe d. Radamoney Raur v. Neelmoney Doss*, above mentioned, proof of the incontinence of the lessor of the plaintiff was given.\*

If, however, the inheritance be once vested in the widow, it is not, by Hindú Law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance and unredeemed by atonement :" 1 Stra. H. L. 136, 163, 164, 244. Mr. Sutherland also rests the forfeiture on degradation from caste. See his remark in 2

(f) Stokes' H. L. Bks., pp. 84, 86.

(g) *Ibid.*, pp. 432, 436.

(h) *Ibid.*, p. 474.

(i) Suppl. to Morton's R. by Montrou, p. 314.

(j) p. 43, para. 25 ; pp. 173, 174, para. 19 ; and see per Arnould, J., 1 Bom. H. C. Rep. 69.

(k) 2 W. H. Macnaghten, 20, 21.

\* NOTE.—As to partial or total loss of *maintenance* as a consequence of incontinence, see 1 Stra. H. L. 172, 244 ; 2 *Ibid.* 273, note by Mr. Ellis ; 2 Macn. H. L. 112, Case V. ; 1 Mad. H. C. Rep. 372 ; 2 Mad. H. C. Rep. 337 [but that was a case of divorce] ; Mayúkha, Ch. IV., Sec. viii., pl. 9 ; Stokes' H. L. Bks., p. 86 ; Miták. Ch. II., Sec. 1., pl. 37, 38 ; Stokes' H. L. Bks., p. 439 ; Steele, p. 42, para. 25 ; pp. 173, 174, paras. 18, 19 ; 7 Macn. S. D. A. Rep. 144.—ED.

Stra. H. L. 269, Appendix. So too Mr. Colebrooke says :— “ Nor after the property has vested by inheritance, does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement.” See his remark 2 Stra. H. L. 272, App. Not only incontinence after the husband’s death (Steele, p. 41, para. 23), but, in many cases, even adultery in his lifetime, may be expiated by penance (*l*). The penance is generally prescribed by an assembly of the caste (*m*). The power to degrade was, in the first instance, with the caste themselves, assembled for the purpose ; from whose sentence, if not acquiesced in, there lay an appeal to the King’s Courts : 1 Stra. H. L. 162.

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There has not been any finding in this case as to whether Bhikú had been put out of caste ; or, if so, whether she has since, by penance, expiated her incontinence, if any. We have, however, arrived at the conclusion, that modern legislation has rendered those questions immaterial. At the first glance at Act XXI. of 1850, we had some doubts, arising from its preamble, whether the Act applied to the case of a widow degraded from caste on the ground of incontinence. But a closer examination of that enactment removed the doubt. The Legislature did not simply extend the Bengal Reg. VII. of 1832, Sec. ix., which is set forth in the preamble, to the rest of British India ; but, reciting that it would be beneficial to extend its “ principle” throughout British territory, enacted that “ so much of any law or usage, now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.” The Act is not limited to renunciation of religion only, but, after providing

(*l*) Steele, pp. 39, 40, para. 19 ; pp. 172, 173, 174, paras. 15, 19.

(*m*) *Ibid.*, Pref., p. x., and p. 174.

1867. PA'RVATI' for that case, specially includes deprivation of caste, and is not restricted to deprivation of caste on any particular ground. Hence deprivation of caste, whether it be for change of religion, or for unexpiated incontinence, or any other cause, can no longer be recognised as either working a forfeiture of any right or property already vested in interest, or as impairing or affecting any right of inheritance.

We have consulted the Chief Justice, and our other learned brethren usually sitting at the Appellate Side of the Court, and find that they concur in that view of Act XXI. of 1850, which appears to have been the same as was taken by Sir Lawrence Peel, C.J., in *Doe d. Saummoney Dosee v. Nemychurn Doss* (n), a case decided in July 1851. The lessor of the plaintiff was a Hindú widow, who had inherited her husband's property, but had been deprived of possession, and sued to recover it. The defence was that she had forfeited her right in the property, by reason of her having, since his death, led an immoral and unchaste life. Peel, C.J., referring to Act XXI. of 1850, gave a verdict in her favour.

We must hold that, although Bhikú may have been incontinent, and may consequently have been expelled from caste, she would not, upon those grounds, be disqualified to obtain a partition in her favour of Dhondirám's property.

If however, she have duly remarried, she would cease to have any right to recover or hold any part of the property of Dhondirám. The Judge having left the fact of remarriage unascertained, we must reverse his decree, and remand the cause for the determination of that question, for which purpose fresh evidence may of course be taken. The burden of proof of the affirmative of that issue will lie upon Párvatí, who pleads this remarriage as a forfeiture of Bhikú's right. If the present Judge decide that issue in the affirmative, *i.e.*, against Bhikú, there should be a decree by him in favour of the defendant Párvatí; but, having regard to her conduct, and that of the deceased

Dhondirám, we think such decree should be without costs. If the Judge decide the question of the alleged remarriage of Bhikú in the negative, there should be a decree in her favour for a moiety of the property of Dhondirám, which has come to the hands of Párvatí, with costs ; and the Judge should ascertain, as accurately as he can, the value of that property. So far as we can gather from the judgment of the late Judge, he arrived by simple conjecture at the value of certain gold ornaments, part of the property.

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v.  
BHÍKU'.

WARDEN, J., concurred.

*Decree reversed, and suit remanded.*

—♦—  
*Special Appeal No. 164 of 1867.*

June 24.

HARJI'VAN ANANDRA'M ..... *Appellant.*  
NA'RAN HARIBHÁ'I ..... *Respondent.*

*Hindú law—Gift of Land—Possession.*

*Held that a gift of land is not complete, by Hindú law, without possession or receipt of rent, by the donee.*

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge of the Súrat District at Broach, in Appeal Suit No. 72 of 1865, reversing the decree of the Munsif of Hansot.

The facts sufficiently appear in the following judgment, recorded in appeal :—

“This action was instituted by Harjívan Anandrám to recover possession of two bighás of land in the village of Asthá, Pargańá Hansot, from Náran Haribhái, who held the land as tenant.

“Náran Haribhái's defence was that he had cultivated the land for more than thirty years ; and that, if the deed of gift produced by the plaintiff in support of his title be true, he could not account for his (defendant's) having paid the rent of the land, since the date of the deed, to the donor.

“The Munsif decreed for the plaintiff, with costs, on the

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HARIBHAI. grounds that the proprietary right over the land was proved to belong to him, and that the defendant was only a tenant at will.

“Náran Haribhái appeals on the grounds:—(1) That he was not a party to the deed of gift, and that it, therefore, cannot affect him; (2) that, according to the terms of the deed, the plaintiff ought to have brought his claim against Bápu, the alleged executant of the deed; (3) that it is proved that he has had possession of the land for more than twenty years as a sort of *japti khedút* (permanent cultivator); (4) that the deed is false and void.

“The issues for decision are:—(1) Is respondent the owner of the land; (2) if so, is he entitled to recover possession from appellant.

“My finding upon the issues is:—(1) That respondent is not the owner of the land; (2) no decision is necessary. No further issue was sought by the parties.

“It appears that in this case the land in dispute was given to the plaintiff, now respondent, in Samvat 1918 (A. D. 1862) by one Bápu; but that the gift has never been completed by a transfer or delivery of the property; and the donor, Bápu, now denies the gift altogether. It is clear, therefore, that in point of law the gift is a *nudum pactum*; the gift never having been completed, the promise to give is null and void. As a matter of conscience Bápu is, of course, morally bound to fulfil his promise, but he cannot be compelled to do so by law, especially when, as it appears, there was no consideration whatever for the promise, except the very questionable one mentioned by Bápu, viz., that respondent being village pátel, he might some day be useful. Even supposing that the gift had been completed, I very much doubt whether it would not be invalid, on account of its being founded upon an apparently immoral consideration. As it is, however, no perfect gift has taken place; and the respondent had no right whatever over the land, and, therefore, no right to sue for its possession. I reverse the Munsif's decree. All costs on respondent.”

The special appeal was heard by COUCH, C.J., NEWTON and WARDEN, J.J.

*Dhirajlál Mathurádás* for the appellant.

*Nánábhái Haridás* for the respondent.

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*Cur. adv. vult.*

COUCH, C.J. :—The question which we have to determine is, whether the Judge was right in holding that the gift was not complete without delivery ; and we are of opinion that he was. We must, however, observe that, although he has come to the right conclusion, he does not give any satisfactory reason for his decision. He does not appear to have bestowed much thought upon the question, whether by the Hindú law a gift of land is complete without delivery to, or possession by, the donee. He appears to have confounded a gift, which does not require any consideration, with a contract or promise, which requires a consideration, to support it.

The instrument in this case was in the terms of a present gift, and was not a mere promise to give ; and it is necessary to consider, whether such an instrument, unaccompanied by possession, is sufficient to pass the property to the donee.

The following authorities show what must be considered to be the Hindú law upon this point :—

In Macnaghten's Principles of Hindú Law (a) the following passage from the *Mitákshará* is cited :—“The acceptance of gold cloths &c., being completed by the ceremony of bestowing water, and falling, therefore, under either of the means, may be designated as a three-fold acceptance ; but in the case of land, as there can be no corporeal acceptance without enjoyment of the produce, it must be accompanied by some little possession : otherwise the gift, sale, or other transfer is not complete.”

In the *Vyavahár Mayúkha*, chap. 9, paragraph 6, we find Nárad thus propounds the distinctions of gifts valid and void : “Valid gifts are declared to be of seven sorts ; void gifts assume sixteen forms.” “They, who know the

(a) Madras Ed of 1865, p. 218.

1867. law of gifts, declare, that things once delivered, as the  
 HARJIVAN price of goods sold ; as wages ; for [the] pleasure [of hearing  
 ANANDRA'M  
 v.  
 NA'RAN poets, musicians, or the like] ; from natural affection ; as an  
 HARIBHĀ'I. acknowledgment to a benefactor ; as a nuptial gift to a  
 bride [or her family] ; and through regard, cannot be re-  
 sumed" (b).

In the Digest it is said : "The term used by *Manu* (Chap. I., v. ii., i.) denotes payment or delivery ; non-delivery of what has been given is retraction of it. Delivery here intends a perfect gift : its converse is an imperfect gift, and is a title of law, namely, subtraction of what has been given. Given denotes the intention of the giver expressed in this form 'let this be thine' : the word interpreted subtraction, may signify imperfect or undue donation ; where that exists there is imperfection of gift" (c).

"Of houses and of land, acquired by any of the seven modes of acquisition, whatever is given away, should be delivered, distinguishing land as it was left by the father, or gained by the occupier himself :" *Vrihaspati* (d). "Let the acceptance be public, especially of immoveable property ; and, delivering what may be given and has been promised, let not a wise man resume the donation :" *Yadnavalkya* (e).

Again it is said :—" If some person, having no issue, tell any man related or not related to him, 'I give thee all my property, and thou shalt perform the last duties for me ;' but the land or the like be afterwards occupied by the donor ; what is the rule in regard to the validity of the gift ? Without occupancy the donation cannot be valid : but if the donee reply, 'I give this to preserve the aged giver from poverty ;' not 'I relinquish this ;' then the gift is valid on proof of occupancy " (f).

Without possession or receipt of rent by the donee (the special appellant) the gift in this case was not complete ; and the decree of the appellate court below, in favour of the defendant, is right, and must be affirmed with costs.

*Decree affirmed.*

(b) Stokes, H. L. Bks., p. 134. (c) Commentary on Bk. II., chap. iv., ii.

(d) Dig. Bk. II., chap. iv., xviii.

(e) *Ibid.* xxxii.

(f) Dig. Bk. II., ch. ii., lvi., Madras Ed. of 1865, Vol. I., p. 460.

*Special Appeal No. 471 of 1866.*

1867.  
Jan. 7.

MUSABHI, wife of HA'JBEG RUSTAMBEG....*Appellant.*  
SHA'UNUDDIN HISMUDDIN and others....*Respondents.*

*Decree for delivery of land—Obstruction by mortgagee in possession—Mistake of Munsif—Irregular procedure—Appeal—Civ. Proc. Code, Secs. 226, 227, 229, and 231.*

On a complaint by a decree-holder, under Sec. 226 of the Civ. Proc. Code, against a mortgagee in possession of the land and two other persons, who resisted the execution of the decree, the Munsif passed an order for delivery of possession, but without having numbered and registered the claim as a suit, as directed by Sec. 229 of the Code—which, in his opinion, did not apply to the claim of a mortgagee in possession; and the Senior Assistant Judge—though of opinion that the Munsif was in error in not proceeding under Sec. 229—ruled that there was no appeal from his order, as the claim had not been numbered and registered, and investigated as a suit:—

*Held* that the irregular procedure of the Munsif should not prevent the Court from correcting his error; and that his order, which could only have been made under Sec. 229, was subject to appeal under Sec. 231, and should, therefore, be reversed, and the case remanded, that the claim might be numbered and registered as a suit, and an order passed thereon after due investigation, as directed by Sec. 229 of the Code.

THIS was a special appeal from the decision of the Senior Assistant Judge of the Sûrat District, at Broach, rejecting an appeal against an order of the Munsif of Jambusar.

The respondents had applied to the Munsif for the execution of a decree for the delivery into their possession of certain land, and an order for the purpose was accordingly made. The appellant Musabhi and two other persons resisted the execution, alleging that the land was held by Musabhi as mortgagee. The respondents, thereupon, applied to the Court under Sec. 226 of the Civil Procedure Code.

The Munsif passed an order that the land should be delivered into the possession of the respondents, on the ground that two of the persons alleged to have resisted the execution of the decree had no objection to the delivery, and that, with respect to Musabhi's claim, Sec. 229 of the Code did not appear to apply to the case of a mortgagee, and that, under Sec. 227, her claim must be refused.

1867.

MUSABHI  
v.  
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DIN.

The Senior Assistant Judge, on the 15th of September 1866, was of opinion that an appeal *did* lie in the case, recording the following reasons :—

“ The Munsif's order in this case purports to have been passed under Sec. 227 of the Code, and from an order under that section, Sec. 364, in my opinion, prevents an appeal being heard. But, though nominally passed under Sec. 227, there is nothing in the order to show that that section applies ; because the appellant, Musabhi, who occasioned the resistance, was not the defendant, and there is no proof that she occasioned the resistance at the defendant's instigation, nor does the Munsif in his order state that to be his opinion. The Munsif appears, in the first place, to have decided that Sec. 229 could not apply to the case, because Musabhi claimed as mortgagee of the land, and then, without taking any evidence, but (as he has written) ‘ having regard to 227,’ to have confirmed the respondents in the possession. I must, therefore, regard the orders as passed under Sec. 229, and therefore appealable from, under Sec. 231 of the Code.”

After this the following minute was entered by the Judge on the 17th of September 1866 :—

“ I adjourned the decision of this case on Saturday (15th September), because it transpired, in the course of the further hearing, that the lower court did not number and register the appellant's claim as a suit between the decree-holder and her, and then pass a decision as in a regular case ; and that, therefore, there was an evident irregularity in admitting the present appeal, as if brought under Sec. 231 of the Code. By the words used in that section, it seems clearly to be intended that an appeal shall be from the decision passed by the court *after* the claim has been numbered and registered as a suit. No such decision has been passed by the lower court in this case. \* \* \* Under this view I must vary my finding upon the preliminary issue, and now rule that an appeal does *not* lie in this case.

“ That I am correct in this present ruling is proved by the circumstance that it is impossible to apply the rules appli-

able to appeals from decrees to this case, without overstepping my jurisdiction as an appellate court. The Munsif has taken no evidence whatever, but has decided that Musabhi's claim does not come under Sec. 229. Under ordinary circumstances I should reverse the lower court's decree upon this preliminary point, and remand the case for re-investigation. But the effect of such a remand in this case would be, not that the Munsif would re-try the claim as a regular suit under Sec. 229; but that he would re-open the investigation (which he ought to have made, but never yet has made) under Sec. 227, and then, if satisfied that the appellant claims *bonâ fide* to be in possession of the property on her own account, would number and register the claim as a regular suit. That is to say, whilst apparently deciding an appeal from an order passed under Sec. 229, I should in effect be directing a re-investigation under Sec. 227, which I have no authority to do.

"I find that it has been ruled by the High Court of Calcutta, on the 20th of September 1864, in *Goluck Narain Dutt v. Bistoo Prea Dossée* (a), that no appeal lies against a refusal of the Court to entertain an application made under Sec. 230 of the Code, and that the remedy is by a regular suit; and that decision confirms the view I have taken, nearly the same reasoning being applicable to that section as to Sec. 229."

The special appeal came on for hearing this day before COUCH, C.J., NEWTON and WARDEN, JJ.

*Nánâbhâi Haridâs*, for the appellant, contended that the lower court was wrong in law in reversing its order of the 15th of September, in the absence of any application for a review of it. The proper course would have been to remand the case to the Munsif's Court.

*Dhirajlál Mathurâdâs*, for the respondent, was heard in support of the decision of the Senior Assistant Judge.

COUCH, C.J.:—In this case, as appears from the judgments of the lower courts, a mortgagee in possession resisted the

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(a) 1 Calc. W. Rep. Civ. R. 140.

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DIN.

execution of a decree by a decree-holder, and claimed to be allowed to remain in possession of the land. The claim, therefore, properly came under the provisions of Sec. 229 of the Code.

The Munsif passed an order by which he directed the possession of the property in question to be made over to the decree-holder. This order he could pass only under Sec. 229, for that section alone gave him authority to decide such a claim. It is true that, owing to his mistake—that a mortgagee was not contemplated by Sec. 229—he held that section not to apply to the case, and therefore refused to number and register the claim as a suit between the decree-holder as plaintiff and the claimant as defendant. But such an irregularity on his part should not prevent us from correcting his error. The Munsif's order, having been really made under Sec. 229, was subject to an appeal under Sec. 231; and the Judge was, therefore, wrong in his final decision. The first view he took of the case was the correct one. He ought to have remanded the matter, for the Munsif to correct his irregularity in not numbering and registering the claim as a suit.

We, therefore, reverse the Judge's order; and remand the case, that the claim may be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant; and that the Munsif may proceed to investigate the claim, and pass such order as he may deem proper under the circumstances of the case.

*Case remanded.*

Sec. 231 :—“ The decision passed by the Court under either of the last two Sections shall be of the same force as a decree in an ordinary suit, and shall be subject to appeal under the rules applicable to appeal from decrees; and no fresh suit shall be entertained in any Court between the same party or parties claiming under them, in respect of the same cause of action.”

Special Appeal No. 499 of 1866.

1867.  
Jan. 28.

VINA'YAK K. DHAVLE and others ..... *Appellants.*  
 BHA'U' B. SA'MVAT..... *Respondent.*

*Pauper Suit—Limitation—Act VIII. of 1859, Secs. 299, 300, and 308—Act XIV. of 1859, Sec. 1, Cl. 15—Reg. V. of 1827, Sec. VIII.*

*Held* that a pauper suit commences for the purpose of limitation on the day when the petition to sue *in formâ pauperis* is presented to the Court, under Sec. 299 of the Code; and not on the day when, the application being granted—it is numbered and registered under Sec. 308.

BHA'U' sued *in formâ pauperis* to recover possession of half a village: alleging that his grandfather had mortgaged the same to the Dhavle family in A.D. 1780 for Rs. 700; and that his father had paid the money to redeem it in 1847; notwithstanding which the defendants continued in possession.

The petition to sue *in formâ pauperis* was presented to the Court on the 21st of November 1861; and was numbered and registered as the plaint, on the 5th of November 1863, under Sec. 308 of Act VIII. of 1859.

The Sadr Amín found that terms of redemption had been agreed to 1847; but that the whole of the money then due was not paid. He, therefore, ordered that the property in dispute should be made over to the plaintiff, on his paying to the defendants Rs. 2,001.

Against this decision an appeal was preferred by the defendants; and C. B. Izon, Joint Judge of the Konkan District at Ratnágirí, decided that the property had been redeemed in 1847; and that the documents produced to prove that money was still due from the plaintiff to the defendants were fraudulent. He, therefore, ordered the property to be made over to the plaintiff, without any payment by him.

The special appeal came on for hearing this day before COUCH, C.J., and NEWTON, J.

*Shántárám Náráyan* (with him V. N. Mandlik), for the special appellants:—The petition of the plaintiff to sue *in*

1867. *formā pauperis* not having been numbered and registered as a plaint until the 5th of November 1863, Sec. I., cl. 15, of Act XIV. of 1859 applies to the suit, which was not brought within sixty years of the date of the mortgage.

*Nánábhái Harídás* (with him *Ganpatrám Bháskar*), for the respondent :—The suit should date from the presentation to the court of the *petition* which in a pauper suit corresponds with the plaint in an ordinary suit : Sec. 300 of Act VIII. of 1859 ; and at that date (21st November 1861) Act XIV. of 1859 was not in operation. The provision of Sec. viii. of Reg. V. of 1827 applies, under which “no length of time shall prevent the Court’s entertaining the suit—to recover property held in mortgage :” provided that “should such property have been held, if immoveable, for more than thirty years by a *bonā fide* possessor as proprietor—such possessor shall not be disturbed.”

Couch, C.J. :—It has been decided in the High Court at Calcutta, in Special Appeal No. 58 of 1862 (a), that “in calculating the period of limitation, in a case when it is sought to extend the time by reason of a pauper suit having been commenced, the suit is commenced for this purpose when the plaint is presented to the Court, and not merely at the date of its allowance.” And in Special Appeal No. 650 of 1864, heard in this court on the 7th of December 1864, we expressed a similar opinion on the subject, but it was not necessary to decide the point in that case, which was disposed of on other grounds.

In the present case, we decide that the point now urged—that the suit is barred by the law of limitation—fails ; and the other points taken having been decided against the defendants by the Joint Judge, on the appreciation of evidence, we affirm his decree with costs.

*Decree affirmed.*

(a) 1 Marshall’s Rep. 174.

Special Appeal No. 539 of 1866.

1867.  
Jan. 28.

AMIRSA'HEB HAFIZULLA' ..... *Appellant.*  
 JAMSHEDJI RUSTAMJI ..... *Respondent.*

## Costs—Discretion—Special Appeal.

An improper exercise of discretion in awarding costs—against which a Regular Appeal would lie—is no ground for allowing a special appeal; unless the award is contrary to some particular law on the subject.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge of the Súrat District at Broach, in Appeal Suit No. 153 of 1864, amending the decree of the Sadr Amín of Broach, in Original Suit No. 1110 of 1864, by altering the award of costs.

Amírsáheb Hafizullá brought a suit to recover possession of two buildings: alleging that they were wrongfully taken from him and retained by Jamshedji Rustamji and Rualláh *alias* Mírsáheb valad Hemudullá Chhoṭesáheb. The Sadr Amín of Broach passed a decree in favour of the plaintiff, on the ground that the buildings in question were proved to belong to one Hedarsáheb, in succession to whom they belonged to his heir, Amírsáheb, and ordered plaintiff's costs to be paid by both the defendants.

The defendant, Jamshedji Rustamji, appealed against the decision for costs, on the ground that he had taken the property in question in mortgage from his co-defendant, Rualláh, and that it was unjust that he as mortgagee should be burdened with the costs of an action for the merits of which the other defendant was responsible.

The decision of the District Judge was as follows:—

“The reason he (the Sadr Amín) gives for his finding as to costs is, that Jamshedji took the disputed property in mortgage from Rualláh, without having in the first place made due inquiry as to whether Rualláh was really the owner. But I conceive that a man who mortgages property to which he has no claim, is very much more at fault than the person who unwillingly takes such property in mort-

1867. HAFIZULLA  
v.  
JAMSHEDJI. gage; and it is just that the former should be burdened with any expense the true owner may be put to in substantiating his right, and not the latter.

“ I, therefore, amend the Sadr Amín’s decree; and order that Amírsáheb’s expenses be paid by Rualláh alone, and that the costs of the appeal be also paid by Rualláh.

*Dhirajlál Mathurádás*, for the appellant, contended that as the mortgagee had derived benefit from the estate, and had disputed plaintiff’s claim, he ought to pay the costs, and more particularly because the mortgagor was insolvent.

*Shántarám Náráyan* for the respondent.

COUCH, C.J. :—The first point to be determined is whether there is any ground of special appeal in this case. In the High Court at Calcutta Sir Barnes Peacock lays down the following proposition of law :—

“ Whether a special appeal will lie or not, must depend upon circumstances. If the lower court should award costs to the losing party, it might be an improper exercise of discretion, against which a regular appeal would lie; but it would not be a matter of special appeal, unless it should be held contrary to law to award costs under any circumstances to the losing party. If costs should be allowed contrary to law, it would be a subject of special appeal.

“ For instance, if the Court should allow costs for three pleaders for one plaintiff, where the law allows costs for only one pleader, or should allow costs for a pleader calculated according to a higher percentage than the law allows, it would be an error of law, and a matter for special appeal. Many other instances might be cited in which the Court might exercise its discretion in awarding costs contrary to the law laid down in some Act or Regulation. In such a case a special appeal would lie, but where there has been merely an unsound exercise of discretion, a special appeal would not lie.”

I entirely concur in this.

The proper remedy is to apply for a review of the Judge’s decision if there is any obvious error. However, this point

does not arise before us now. If I were sitting in Regular Appeal, I should allow the costs to be paid in the first instance by both defendants, with liberty to the mortgagee to recover them from the mortgagor; but it would be inequitable to leave the plaintiff without his costs, whilst the mortgagee is solvent.

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NEWTON, J., concurred.

PER CURIAM:—The Court confirms the Assistant Judge's decree with costs.

*Decree confirmed.*

*Special Appeal No. 296 of 1866.*

1867.  
Jan. 30.

AJURA'M MANIRA'M.....*Appellant.*  
KUSA'JI valad SHEKOJI and another.....*Respondents.*

*Mistake of Judge—Material issues—Remand.*

In a suit to redeem land alleged to have been purchased by the special appellant at an auction sale, and then mortgaged by him to the respondents the District Judge reversed the Munsif's decree for redemption—being under a mistake as to what was necessary to be proved with reference to the dimensions of the land; and as the mistake was one which was likely to have affected his conclusions on other facts in dispute, and as other material questions had not been decided, the issues in the case were framed by the High Court, and the suit remanded for a new decree to be passed upon them.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 79 of 1866, reversing the decree of the Munsif of Sirur in Original Suit No. 1582 of 1864.

The original suit was brought by the special appellant, who claimed to redeem certain land mortgaged to the defendants (the special respondents) in 1853.

The defendants denied the mortgage; and the Munsif, finding that the plaintiff had purchased the land in question at an auction sale, and subsequently mortgaged it to the defendants, passed a decree for redemption on payment by the plaintiff of Rs. 210.

On appeal by the defendants from this decree, the Judge laid down the following issues:—(1) Is the land that of which plaintiff had the hereditary, or any other valid pro-

1867.—  
 AJURA M  
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 et al.

prietary, right, over which they executed the mortgage deed on the 19th of November 1853; (2) under the condition of that deed, can defendants be called on to vacate.

The following judgment was recorded:—

“The Court has examined the exhibits from No. 1 to 55 inclusive. There is no certificate of sale by which it can be ascertained that Rattan Maṇirám (the deceased plaintiff) did purchase the portions of the fields Nos. 158 and 159 at auction, by order of the court, in satisfaction of a decree No. 21 of 1849, the judgment debtor being Yesu valad Desji Shelke. The name, number, and dimensions of the land in the exhibit No. 5 do not correspond with those of fields Nos. 158 and 159. \* \* \*

“My finding on the first issue is that the land, Nos. 158 and 159, is not, on evidence, as that to which plaintiff Ajurám, or those from whom he derives, has either hereditary or any other title as proprietor, obtained by purchase, nor does any credible evidence substantiate execution by the said Ajurám valad Maṇirám of a deed of mortgage.

“My finding on the second issue is that on the evidence adduced, defendants cannot be called on to vacate.

“The decree of the lower court is reversed with costs on the respondent, Ajurám Maṇirám.”

The special appeal came on for hearing this day before COUCH, C.J., and NEWTON, J.

*Reid* (with him *Shántárám Náráyan*) for the appellant.

*Nánábhái Haridás* for the respondent.

COUCH, C.J.:—There is some difficulty in arriving at a satisfactory conclusion in this case, owing to the way in which it has been dealt with by the District Judge in appeal: for—however erroneous his conclusion may have been, and however much we may lament that it has been made—we cannot on a special appeal interfere with his decision, unless we find that there was a substantial error or defect in law in the investigation of the case.

Now in this case there was one very material question of fact to be determined, namely, did the plaintiff become the

purchaser of the land in dispute at an auction sale. His allegation was that he first purchased the land and then mortgaged it to the defendants : whilst the defendants set forth their own anterior possession, and say that the land belonged to them before the alleged auction sale ; but they afterwards alter their statement.

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AJURA'M  
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v.  
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et al.

The Judge says that the name, number, and dimensions of the land in the exhibit No. 5 do not correspond with those of fields Nos. 158 and 159. It was a mistake on his part to suppose that they could correspond, as they had been altered in consequence of the introduction of the Revenue Survey into the District ; and that mistake is such a one as may have materially affected his finding, especially when the plaintiff claimed to redeem portions only of those fields. Had the Judge come to the conclusion that the plaintiff had purchased the land, he would probably also have found that he had mortgaged it.

Another important question of fact is, whether the instrument (exhibit No. 29) was executed by the defendants. But the judgment is silent on that point.

As we cannot arrive at a satisfactory conclusion upon the issues as framed and the evidence already recorded, we must point out what the material issues are, and remand the case.

The following appear to be the material issues in the case :—(1) Whether the plaintiff purchased the land which is the subject of the suit at the auction sale ; (2) whether the deed No. 29 was executed by the defendant ; (3) whether the plaintiff mortgaged to the defendants the land which is the subject of the suit ; (4) if it be found that the plaintiff became the purchaser at the auction sale, then, whether he had, at the time of the suit, lost his right to recover the land claimed, either absolutely, or as a mortgagor upon paying off the mortgage.

NEWTON, J., concurred.

The Court reversed the Judge's decree, and remanded the case, that a new decree might be passed upon the findings on those issues, awarding costs.

*Case remanded.*

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Feb. 18.

## Special Appeal No. 630 of 1866.

PRA'NJIVAN GOVAN.....*Appellant.*  
 JAISHA'NKAR BHAGVA'N .....*Respondent.*

*Bhágdári tenure—Purchase by stranger of building erected on gabhán—Bombay Act No. V. of 1862.*

In a suit brought by a *bhágdár*, or shareholder in a *bhág*—*bhágvár* village, to recover possession of a *gabhán*, or building-site, and a *vádá*, or homestead, —appurtenant to his *bhág*,—from a stranger, who had purchased at an auction sale a building erected on the *gabhán* by a third person with the *bhágdár's* consent :

*Held* (reversing the decision of the District Court) that the purchaser of the building had only acquired a right to remove the building materials, and that he had no right, by reason of his having purchased the building, to continue, without the *bhágdár's* consent, in possession of the *gabhán* and *vádá*, which, by the Bhágdári Act, could not be alienated apart or separately from the *bhág*, or some recognised subdivision thereof.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge of the Súrat District at Broach, in Appeal Suit No. 67 of 1865, reversing the decree of the Munsif of Hansot, in Original Suit No. 174 of 1864.

Pránjívan sued Jaishankar to obtain possession of a *gabhán*, or building-site, and *vádá* or homestead, by causing him to remove a building constructed thereon which he had purchased at an auction sale.

The defence was that the site in question did not form a part of the plaintiff's *bhág*; but that it was part of the waste land in the village, which was understood to belong to the owner of the house built upon it.

The Munsif decreed in plaintiff's favour, on the ground that the site was proved to form part of his *bhág*, and that the *gabhán* and *vádá* had not been sold with the building at the auction sale at which the defendant purchased.

Against this decree the defendant appealed; and the Senior Assistant Judge, after holding that the site did form part of the plaintiff's *bhág*, and that the defendant had purchased the building, and nothing more, at the auction sale, reversed the Munsif's decree, on the ground that it was

inequitable to compel the defendant to remove the building, that he had purchased at a heavy price ; stating his reasons as follows :—“ The Munsif has quoted the old Roman Law in support of his decree for directing the destruction and removal of the appellant's building. That law is, of course, valuable as a guide and instructor in general principles, but in a matter of this sort, a Civil Court must be guided by equity and good conscience ; and when I ask myself, whether on the principles of equity and good conscience, it is just that respondent should be compelled to destroy and remove a valuable house, only lately purchased by him for a high price, I cannot but decide that it is not.

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BHAGVAN.

“ Moreover, the Roman Law, referred to by the Munsif, does not apply to the present case ; because that law went upon the supposition that a man knowingly built a house upon another man's land without that man's consent. In this case respondent admits that his relative Mádhav Náná built the house with his consent, so that the cases are not parallel. In the present instance appellant, having bought the building and obtained possession of it, is suddenly reminded that he has no right to the ground on which it stands. What is he to do ? If he pulls down the house and takes it away, and sells the materials, or rebuilds it, the result of his purchase will be very different indeed from what he intended or expected, and he may be caused considerable loss.

“ It may be said that the principle of *caveat emptor* should apply ; and if I thought it satisfactorily proved that respondent's agreement with Mádhav Náná was that he was to remove his building at any time respondent might wish him to do so, appellant, who has bought Mádhavráv's right and title over the building subject to all conditions, would perhaps have less reason to complain at being compelled to remove the building. But I do not find that respondent's witnesses have at all satisfactorily proved this alleged stipulation, which is, on the face of it, a very improbable one. I must, therefore, simply regard appellant in the position of a man who has bought a building, but who has been unable to come to terms with the owner of the ground on which the

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building stands. It would be inequitable to compel such a man to remove his building and clear the ground.

"The justice of the case would be fully met by awarding the owner of the ground a fair rent, which is, I think, all that respondent could, in this case, honestly demand. If rent were refused, then, but not before, would be the time for an action of the sort now brought. As no alternative appears to have been offered by the respondent, I cannot now pass a decree for what is not asked for in the plaint, and have, therefore, no option but to reverse the Munsif's decree."

The case was heard before COUCH, C.J., and NEWTON, J.

*Dhirajlál Mathuráulás* for the appellant.

*Nánábháí Haridás* for the respondent.

COUCH, C.J.:—By the Bhágdári Act, it was not competent to the defendant to purchase more than the materials of the building ; and if he paid more than the value of those materials (which it is not found that he has done) he must suffer the consequences : as he must be taken to have known the law.

The Act prevents the defendant acquiring any right in the *gabhán* or *vádá* ; and the decree of the Senior Assistant Judge, that he should be a perpetual tenant at a fixed rent, would give him an interest in the land forbidden by the Act. If we were to allow him to acquire any interest in the land, without the consent of the *bhágdárs*, we should be giving validity to a transaction which was contrary to the provisions of the Act.

We, therefore, reverse the decree of the Senior Assistant Judge ; and affirm that of the Munsif with costs.

*Appeal allowed.*

NOTE—For a description of the Bhágdári tenure, and the provisions of the Bhágdári Act, see 2 Bom. II. C. Rep., pp. 244-249. Ed.

*Special Appeal No. 636 of 1866.*

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Feb. 18.

NAWA'B MI'R KAMA'LUDDIN HUSEN KHA'N  
SA'HEB, a minor, by his mother and  
guardian MI'RJA' BEGAM ..... *Appellant.*  
BHIKA' MA'NJI, heir of his wife, Bhulki ... *Respondent.*

*Landlord and Tenant—Husband and Wife.*

Upon the death of a tenant under a jágirdár, his widow passed a kabuláyat, agreeing to hold the land on the same terms as her late husband; and that in the event of her marrying again, she should have no right to the holding, but that if she got her husband to live in her house, she might continue to hold the land. She afterwards remarried, and held the land till her death.

In an action brought by the second husband to recover possession of the land, as the heir of his wife :—

*Held* (reversing the decrees of both the courts below) that the plaintiff had no right to recover possession, as his wife had merely a personal interest in the holding, which ceased upon her death.

THIS was a special appeal from the decision of C. G. Kemball, Acting District Judge of Súrat, in Appeal Suit No. 39 of 1866, confirming the decree of the Munsif of Súrat, in Original Suit No. 1308 of 1865.

Bhiká brought the suit to recover possession of 33½ bighás of land in the village of Vesu, which, he alleged, belonged to his deceased wife, Bhulki, whose heir he was.

The village was held in jágír by the special appellant's father; and the land in dispute was cultivated by Moriá Nemlá, the first husband of Bhulki, as the jágirdár's tenant.

After the death of Moriá, Bhulki executed a kabuláyat, of which the following is a translation :—To the Sarkár represented by Nawáb Sáheb Bismillá Khán Sáheb, written by Kolan Bhulki, widow of Moriá Nemlá, residing in the village of Vesu, to wit : I give in writing as follows :—In the aforesaid village my husband, Moriá Nemlá, had a holding, which, with the increase, was continued to him for eighty rupees and four annas. He having died in the current year, the Sarkár has continued the same in my name. Therefore, after

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deducting the amount on account of the increase, the remainder, Rupees seventy-two of Company's currency, is paid every year. So I shall go on paying this amount periodically, on the (proceeds of the) produce (being realised). And should I act contrary to the orders of the Sarkár, it will be competent for the Sarkár to deprive me of that holding. And, if there be any balance legally standing due against me in the account, I am duly to pay the same. Should I remarry I shall have no right to the holding. The Sarkár will be competent to make it over to any other individual it pleases. This *kabuláyat* I, of my free will and accord, have given in writing. It is duly agreed to and approved of by me. The 13th of May 1860.

“*Postscript.*—Should I remarry, and should I get my husband to live in my house, I am duly to cultivate the holding.”

[Signatures.]

[Attestations.]

Bhulki afterwards married the respondent, Bhiká Mánji, who went to live in her house ; and she cultivated the land and paid the rent up to her death.

The Munsif gave judgment for the plaintiff, on the ground that the land in dispute was the property of his deceased wife, and that he was her sole heir ; and the District Judge, in appeal, affirmed his decree.

The case was heard before COUCH, C.J., and NEWTON, J.

*Nánábhái Haridás* for the appellant :—The property was acquired by Bhulki, either as heir of her first husband, Moriá, or by her own subsequent agreement. In the former case the plaintiff had no right, as he was not the heir of Bhulki's first husband. In the latter case he had no right, as the agreement was personal, and terminated on the death of Bhulki.

*Dhirajlál Mathurádás* for the respondent.

COUCH, C.J. :—The plaintiff claims to be entitled to succeed to the land in dispute, as the heir of his deceased wife, Bhulki.

The land was originally cultivated by Bhulki's first husband merely as tenant of the jágirdár ; and Bhulki was allowed, after Moriá's death, to continue in possession on consenting to the conditions specified in the kabuláyat of the 13th of May 1860.

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It is clear from the terms of the kabuláyat that there was no intention in continuing the holding to Bhulki, to extend the tenancy beyond her life. She had no such interest in the land as would descend to any person as her heir.

We, therefore, reverse the decrees of both the lower courts, and throw out the claim.

*Appeal allowed.*

—♦—

*Special Appeal No. 567 of 1866.*

Feb. 26.

M. S. SINDE and others..... *Appellants.*

G. P. SINDE ..... *Respondent.*

*Patíki vatan—limitation—Act XI. of 1843.*

Plaintiff—being entitled by an arrangement between the members of a family of pátíls, of whom he was one, to a third of the emoluments of the office of managing revenue and police pátíl—sued the defendant in possession to recover a third of a portion of the hereditary fields set apart as remuneration for the performance of the duties of the office ; and the District Judge, in appeal, found his claim barred, on the ground solely that he had not for twelve years been in possession of the one-third which he claimed of the service land :—

*Held* that the suit must be remanded for retrial ; as it did not appear—having regard to Sec. 4 of Act XI. of 1843—whether the plaintiff's turn to officiate as pátíl, and his right to enjoy the land in dispute, and consequently the cause of action, arose more than twelve years before the suit was brought.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 280 of 1866, amending the decree of the Munsif of Násik, in Original Suit No. 1519 of 1863.

The several parties to this suit held a pátílíki vatan in Vanjarvádi, near Násik. A portion of the whole vatan was set aside in 1854, to compensate the person on whom would devolve the duties of managing police and revenue Pátíl, for

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his services. The whole watan paid no assessment to Government then, but subsequently the watan was assessed (*i.e.*, *judi* was laid on it) by Government, and the managing pátíl was paid in cash by Government for his services as pátíl. Plaintiff Múlji alleged that the portion so set aside was in the defendant Govind's possession as managing pátíl, and claimed one-third of it as his share, which reverted to him in consequence of the separate allowance Government had undertaken to pay the managing village pátels.

The Munsif allowed the plaintiff's claim; but on appeal the District Judge remanded the case, and ordered that "other parties interested in the partition of the service land divided off" from the entire watan, be made parties to the suit. The other plaintiffs then joined; and the case was tried a second time by the Munsif of Násik, who decreed in favour of the plaintiffs.

On appeal, the District Judge laid down the following issues: (1) Is there evidence to show that plaintiff Muljí valad Shívji Sinde is one of the hereditary sharers in the emoluments of the office of pátíl of Vanjarvádi; (2) are the fields at issue, Nos. 145, 146, 147, and 149, those allotted for the remuneration of the services of pátíl, and should the plaintiffs be allowed to obtain one-third of each of these fields?"

The following judgment was recorded:—

"It appears from the Registers of cultivated land, that previous to the introduction of the Survey Register, the fields now known as Nos. 145, 146, 147, 149, and another, 133, not at issue, were formerly one field, known as 'Pasore,' containing 106 bighás. The Survey was introduced in 1858, and the Pasore of 106 bighás became four fields containing an aggregate area of 51 acres 25 chains. The plaintiff has admitted before this court that he cultivated, in A.D. 1850, 20 bighás, and has that number now. It appears from the Register of the cultivated lands shown year by year that the same persons who were in possession of the whole of that portion of land known as Pasore, said to contain 106 bighás, are, to the present day, in uninterrupted occupancy; and that

occupancy cannot be disturbed, the plaintiff's claim having clearly passed the period of limitation allowed under Act XIV. of 1859. It appears further that until 1859 the said land Pasore was rent-free, but that from 1860 a sum of Rs. 40, rent on 51 acres 25 chains, was imposed, [in respect] of which appellant Govind valad Pándaji's name is on the receipt book, to which all the persons examined this day have referred. Appellant, Govind valad Pándu, pays Rs. 17-4. The plaintiff Múlji valad Shívji has paid rent, Rs. 2-14. So that plaintiff Múlji neither pays one-third of the tax, nor ever has done so. He has not in his possession one-third of the land assigned for service land, nor has he, at any period from 1850 to the present time, possessed one-third. He has had 20 bighás (whatever that may now represent). It clearly was less than one-third of the entire service land allotted to the pátíls in 1850.

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" My finding on the issue is that the fields Nos. 145, 146, 147, and 149 are those allotted for the remuneration of the services of pátíl; but there is no evidence to show that plaintiff ever has cultivated or held one-third of the aggregate area of these four fields at any time, more especially from 1850 to the institution of the present action in 1863.

" Those who cultivated in 1850 have proved the same proportion of holding from that time to the present day, and pay a proportionate rate of the rent of Rs. 40, which was in 1860 imposed on the service land, namely, the appellant paid yearly Rs. 17-4, and the plaintiff (respondent) Rs. 2-14.

" With regard to the first issue, there is evidence to show that, under an agreement dated Shake 1769, Ashvin Shudha 5, corresponding with 14th October 1847, the mother of defendant Govind, who was then a minor, Múlji valad Rámji, the father of the defendant Krishná valad Múlji, another defendant introduced by the Court under the provisions of Sec. 73 of Act VIII. of 1859 and Múlji valad Shívji, the plaintiff, agreed that each sharer should hold 20 bighás, leaving 40 bighás for the remuneration of the pátíls doing duty as revenue and as police pátíls; and that there is evidence, not only against Govind valad Pándu, but good against

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Krishṇá, the son of Múlji valad Rámji, to show that plaintiff Múlji valad Shíyji Sinde is one of the hereditary sharers in all the emoluments of the office of pátíl at Vanjaryádi.

“ But this Court finds that the present occupants having held the land carried to their names from 1850 to the present day, their occupancy, with regard to the fields at issue, Nos. 145, 146, 147, 149, cannot be disturbed.

“ The decree of the lower court is amended to this, that the existing occupancy, being of a longer period than twelve years prior to the institution of this action, cannot be disturbed with regard to the fields at issue.

“ The litigation having arisen from the opposition caused by the defendant Govind valad Pándu, whose mother entered into an agreement in his name, as far ago as A. D. 1847, admitting the claim of plaintiff to one-third of the office of pátíl, I determine that each party shall pay his own costs.”

The case was heard before COUCH, C.J., and NEWTON, J.

*Vishvanáth Náráyan Mandlik* for the appellant.

*Shántárám Náráyan* for the respondent.

PER CURIAM:—Although it is found by the Judge that the present occupants have held the fields in the same proportion from 1850 to the present time, it does not appear—having regard to Sec. 4 of Act XI. of 1843—whether the plaintiff’s turn to perform the duties of the office, as a representative of the family, and his right to enjoy a corresponding share of the hereditary emoluments under the agreement—and consequently the cause of action, arose more than twelve years before the suit was brought.

The Court reverses the decree of the District Judge ; and remands the case for re-trial, with reference to the above remark.

*Case remanded.*

31/1  
*Special Appeal No. 9 of 1867.*1867.  
March 6.

GUNDO ANANDRA'v and another ..... *Appellants.*  
 KRISHNA'RA'v GOVIND ..... *Respondent.*

*Act XIV. of 1859, Sec. 1., Cl. 13 and 16—Limitation—Watan—Interest—Co-sharers—Manager—Remuneration—Volunteer.*

In a suit to establish a right to share in a watan, and to recover a portion of the profits thereof for seven years:—

*Held* that the case was governed, as to limitation, by Cl. 13 (and not Cl. 16) of Sec. 1. of Act XIV. of 1859; and that arrears for seven years were, therefore, properly awarded.

There is no law by which interest can be awarded in such a case.

A volunteer, who acts as manager, cannot claim remuneration from his co-sharers without showing a previous consent on their part to pay him.

THIS suit was brought by Krishnaráv, to recover a  $\frac{1}{4}$  share of the profits in a certain watan, payable out of three villages, for seven years.

The Sadr Amín originally gave judgment for the plaintiff; and the Joint Judge, in appeal, affirmed his decree.

In Special Appeal (No. 672 of 1865) the decrees of both the lower courts were reversed; and the case was remanded to the Sadr Amín for re-trial, in order to determine the following issues:—(1) Whether any provision was made by the Collector, under Sec. 13 of Act XI. of 1843, for the officiating officer; (2) Whether there was any excess over and above such assignment made by the Collector; (3) If any, what was the plaintiff's share of that excess.

The Sadr Amín found the plaintiff to be entitled to the  $\frac{1}{4}$  share in the watan; and awarded Rs. 277, including Rs. 50 as interest.

On appeal, R. W. Hunter, Acting Senior Assistant Judge at Sholápur, found that no provision was made by the Collector for the officiating officer, under Act XI. of 1843; and that Krishnaráv's share in the watan was  $\frac{1}{4}$ , but inclusive of the shares belonging to Malhár Narsu and Chintáman Govind, members of the same undivided family. He affirmed the Sadr Amín's decree.

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The case was heard by COUCH, C.J., and NEWTON, J.

*Dhirajlál Mathurádás*, for the appellants, contended that arrears of the profits of the watan for more than six years could not be recovered, the same being barred by Act XIV. of 1859; that this was not a suit in which interest could be legally awarded; and that the defendant should have been allowed some remuneration for officiating as manager of the watan.

*Nánábhái Haridás*, for the respondent, contended that this was a suit to share in the watan, and therefore did not come under cl. 16, but under cl. 13, of Sec. 1. of Act XIV. of 1859; and that, as the defendant did not officiate as manager, at the previous request or with the subsequent consent of the plaintiff, he was not entitled to any remuneration.

COUCH, C.J.:—This is really a suit to establish a right to share in the watan; and to recover a portion of the profits of that watan. The whole case comes under cl. 13, and not under cl. 16, of Sec. 1. of Act XIV. of 1859. The lower courts have, therefore, properly awarded arrears for seven years.

There is no law, however, which enabled the lower courts to award interest. The sum of Rs. 50 must, therefore, be deducted from the sum awarded to the plaintiff in the lower courts.

With reference to the demand for remuneration to the defendant for his services as manager, it must be observed, first, that the defendant puts in no such answer in the lower courts; and secondly, that if he be one of the co-sharers, and did service as a volunteer, he cannot charge the plaintiffs for remuneration, unless he can show that they previously consented to pay him. On the contrary, it appears that he performed the services in opposition to their wishes.

We, therefore, amend the decree of the lower court by disallowing Rs. 50; and order the costs of this special appeal to be paid in proportion.

*Decree amended.*

Special Appeal No. 417 of 1866.

1867.  
March 21.

DHUNKA' DEVLA'..... *Appellant.*  
 HIR'A RA'MLA..... *Respondent.*

*Review—Order granting final—Discretion—Special Appeal—Act VIII. of 1859, Secs. 2 and 378.*

In a suit to recover land on a document described as a lease, Munsif M. decided that the document created a mortgage; and that the suit should be for redemption. In a subsequent suit to redeem, Munsif D. decided that the same document operated as a sale, and threw out the claim, which decision was affirmed by the District Judge in appeal. Plaintiff then applied to Munsif L. to review the decree of Munsif M. A review was granted, the claim re-heard, and plaintiff had judgment to recover the land as heir of his uncle, on the ground that his uncle's widow, who passed the document sued upon, had no right to alienate the land. This decree was affirmed by a new District Judge.

*Held*, that though L.'s act in granting the review was of a very questionable character, his order thereon was final, under Sec. 378 of Act VIII. of 1859, and that the propriety of the order could not be inquired into on a special appeal from the decision passed after the review had been admitted.

THIS was a special appeal from the decision of C. G. Kemball, Acting Judge of the Sûrat District, in Appeal Suit No. 5 of 1866, confirming the decree of the Munsif of Surat.

The case was heard before TUCKER and GIBBS, JJ.

*Dhirajlal Mathurâdâs* for the appellant.

No one appeared for the respondent.

The facts of the case sufficiently appear from the following judgment, delivered this day by—

TUCKER, J.:—The plaintiff in this suit, Hirâ by name, originally brought his action in the Court of a Munsif at Surat, as nephew and heir of the husband of a woman named Makli, who had been the last holder of certain assessed land under Government, to eject the defendant, Dhunkâ, whom he asserted to have been the sub-tenant of Makli, and who denied his title as landlord, and refused to vacate.

The defence set up was, that Makli, before her death, had conveyed the land to the defendant. The plaintiff put in a document which he described as a lease of the land by Makli

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to the defendant. The Munsif, A'zam Hazrat Miyá, held that that document created a mortgage, and gave defendant a lien on the land ; and that plaintiff could not recover the land, except by a suit for redemption. He, therefore, dismissed the claim in the form in which it had been brought.

Hirá then instituted a suit to redeem in another Munsif's Court at Surat, when A'zam Daulatráv decided that the deed in question created a sale, and not a mortgage, and threw out the claim to redeem. This decree was affirmed, in appeal, by Mr. Cameron, District Judge of Súrat.

The plaintiff then applied to A'zam Lallubhái, the successor to A'zam Hazrat Miyá, to review the previous decree of his predecessor, and A'zam Lallubhái admitted a review, without recording any reasons for his act, and then re-heard the case, and decreed that the land should be restored to the plaintiff, on the ground that the alienation by the widow Makli was invalid ; and that plaintiff, as the heir of Makli's husband, was entitled to succeed to the land after her decease. This decree was affirmed in appeal by Mr. Kemball, District Judge ; and a special appeal has now been made against his decision.

The objections taken are :—(1) That there were no proper grounds for the admission of a review of his predecessor's decision by A'zam Lallubhái ; and that, consequently, that admission was illegal, and all subsequent proceedings nullities. (2) That the re-opening of this suit, after there had been a decision of the District Court that Makli's deed created a sale, was altogether irregular, and opposed to the intention of Sec. 2 of Act VIII. of 1859, which prescribed that no second suit should be brought on a cause of action between the same parties previously heard and determined.

We are of opinion that the act of the Munsif A'zam Lallubhái, in admitting a review of his predecessor's decision, on the ground of the result of the suit for redemption, which had been instituted in conformity with the direction of that predecessor, was of a very questionable character ; but we are also of opinion that it is not competent to this court to

inquire into the propriety or impropriety of the order made by the Munsif on that occasion. The Civil Procedure Code, Sec. 378, gives authority to a Civil Court to grant a review when it is of opinion that it is requisite for the ends of justice; and it has prescribed that the order granting the review shall be final. We are debarred, therefore, as has already been held in Special Appeal No. 25 of 1866, from looking behind that order.

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The objection taken with respect to Sec. 2 of Act VIII. of 1859 does not apply. When this suit was instituted, there had been no previous suit heard and determined on the same cause of action between the same parties; and the decision of the second suit to redeem, which was commenced after the first decree in this suit had been made, could be no hindrance to the re-opening of this action, if good grounds had been shown for a new trial. The Legislature has left the determination of that point with the court which made the decree of which a revision was sought; and we cannot interfere with the exercise of the discretion which has been expressly given and limited to a court so situated. Cases have come before us recently which have led us to doubt whether it was a wise step on the part of the Legislature to give complete finality to an order admitting a review; but we must administer the law as it stands, whatever our opinion may be of its policy.

No other grounds for interfering with the District Judge's decision have been urged, so we must affirm the lower court's decree; and the special appellant must bear all the cost of this special appeal.

*Decree affirmed.*

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March 21.

*Special Appeal No. 572 of 1865.*

LA'LDA'S RA'MDA'S.....*Appellant.*  
KA'SHIRAM .....*Respondent.*

*Usufruct—Enjoyment—Burden of Proof—Ancient Documents.*

In a suit to prevent the defendants from obstructing the plaintiff in his enjoyment of the fruits of certain trees, which he claimed as heir of a person who purchased that right, the defendants denied the existence of the right, and alleged possession and enjoyment in themselves.

*Held*, that the District Judge, in appeal, having found the possession and enjoyment to be in the defendants, was right in throwing upon the plaintiff the burden of proving his title to the trees or their produce.

Rule of Evidence with reference to ancient documents stated.

THIS was a special appeal from the decision of W. M. Coghlan, Acting Judge of the Khándesh District, in Appeal Suit No. 149 of 1864, reversing the decree of the Munsif of Nandurbár.

The case was heard before TUCKER and GIBBS, JJ.

*Dhirajlál Mathurádás* for the appellant.

*Vishvanáth Náráyan Mandlik* for the respondent.

The facts appear from the following judgment, delivered this day by —

TUCKER, J. :—This suit was brought by the plaintiff, Láldás, as representative of his uncle, Parbhudás Náráyan dás, deceased, to stop the defendants' interfering with his enjoyment of the usufruct of certain mango trees, which he alleged had been mortgaged to his ancestor by one Soubá in A. D. 1791, and had been subsequently sold to the same ancestor by the son of the said Soubá in A.D. 1801.

The defendants denied that the plaintiff had any right to the trees or their produce; and asserted that the trees had been in their possession, and the produce enjoyed by themselves and those who held under them, till 1862, when the plaintiff had attempted to appropriate the crop, which they had prevented. That the persons said to have sold the trees to the plaintiff's ancestors had no ownership in them.

The Munsif of Nandurbár gave judgment for the plaintiff : as he considered that the ancient documents produced by the plaintiff established his right to the trees in dispute, and that the defendants had failed to make out their ownership.

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v.  
KA'SHIBA'M.

This decree was reversed, on appeal, by the District Judge of Khándesh, who considered that it was satisfactorily proved that the trees were in the possession of the defendants and those who derived title from them ; that the documents on which the plaintiff founded his claim were not proved ; and that there was no evidence that the persons who were said to have executed those documents had any right to alienate the trees.

To this decision it has been objected that the District Judge has laid down the law wrongly, in holding that the plaintiff was bound to make out his case, instead of deciding on the whole evidence produced by either party ; and that he should not have rejected documents more than thirty years old, on the ground that their execution was not proved, which was contrary to the rulings of the High Court in Special Appeals Nos. 542 and 411 of 1864.

We are of opinion that in a suit instituted in the form of the present action, the first question to be determined was, who was in possession in 1862, at the time when the cause of action is alleged by the plaintiff to have arisen ; and the District Judge, having found for the defendants on that issue, very properly treated the case as an action of ejectment by the plaintiff, and cast the onus of proving his title to the trees upon him.

As the documents produced by the plaintiff purported to be more than thirty years old, the District Judge, if satisfied that they were really what they professed to be, viz., ancient documents, and that they came from the proper custody, should have dispensed with proof of their execution ; and the Court considers that he acted erroneously in simply rejecting these documents in consequence of defective proof of execution.

He has found, however, that there is no evidence that the

1867. — LA'LDA'S RA'MDA'S <sup>v.</sup> KA'SHI'RA'M. persons who are said to have sold the trees in dispute had any right to dispose of them ; and this being the case, his error in requiring strict proof of the execution of the documents in this case is immaterial, as if the persons who are said to have executed those deedshad no power to sells they could confer no title upon plaintiff.

We are, therefore, of opinion that with the Judge's finding on the issue regarding possession, and on the issue regarding the title of the persons who are said to have made conveyances to the plaintiff's ancestor, his decree was correct, and we affirm that decree with costs on special appellant.

*Decree affirmed.*

March 27.

*Special Appeal No. 62 of 1867.*

MA'DHAVRA'V T. PA'NSE and others ..... *Appellants.*  
B'APURA'V K. PA'NSE ..... *Respondent.*

*Pension—Assignment—Compromise—Act VI. of 1849.*

A pension having been granted by Government to B. P., in lieu of a *Saranjám* held by his grandfather, a claim to share the same by M. P. and his brothers was compromised, by B. P. agreeing to pay them a certain proportion thereof yearly. The Agent for Sardárs, affirming the decree of the Assistant Agent, found the agreement to be null and void, as an assignment of a future interest in a pension.

*Held*, that as the pension was not granted "in consideration of past services and present infirmities or old age," the case did not come within the terms of Act VI. of 1849 ; and that the agreement was a valid one.

THIS was a special appeal from the decision of F. Lloyd, Agent for Sardárs in the Dakhan, in Appeal Suit No. 5 of 1865, confirming the decree of F. D. Melvill, Assistant Agent, in Original Suit No. 22 of 1865.

The special appellants brought the suit to recover Rs. 64 as by agreement, of which the following is a translation :—

"To Chiranjiv Rájáshri Mádhavráv and Rámráv and Balvantráv Trimbak Páñse. From Bápúráv Krishṇa Páñse. To wit : On a petition being made by my respected father, Krishṇaráv Sáheb, to Government, regarding the saranjámi vil-

lages in the pargáá of Ahirvádi, in the Solápur District which had been attached by Mr. Chaplin after the death of the late Mádhavráv Krishṇa, a resolution was passed by Government to the effect that the saranjám should be continued in his name. It was not carried out, however, in consequence of his death. On a petition having lately been submitted by me, a moiety of the pension, amounting to Rs. 531-1-0 per annum, according to the Government Resolution of the 29th of December 1859, was ordered to be entered against my name, agreeably to the rules for (the management of) saranjáms. You made applications to Government, praying to the allowed (a share) therein ; and an order as to final disposal was thereupon conveyed in the Saranjám Outward Letter No. 444, dated the 14th of April in the current year, to be effect that, if you pleased, you might have your remedy in the Civil Courts. A notice was accordingly served upon you. Thereupon you personally came to me at Savnári station, and said that you would agree to (receive) what I would pay to you for expenses ; and that, excepting for this, you would have no connection at all with the said pension, and [or] with any saranjám pension whatever ; and that with regard to this you would never take any step whatever, either by a civil action or otherwise, in any Government office, on any ground whatever. So I am to go on paying to you every year, commencing from the month of May in the year 1861, out of whatever pure balance that may be paid to me, after such deductions as the Government may order to be made from the amount of the pension aforesaid, at the rate of Rs. 12-8-0 for every hundred (rupees), so long as the pension may be continued to me. Excepting for this, you shall have no connection whatever with this affair. This is an arrangement with regard to what has been written above. You have furnished me with a copy of this paper under your signature, on a stamp of eight annas. The 9th of May 1862. The handwriting of Hari Bajáji Pánse, Joshi Kulkarni of Mouje Savnári, at present staying at Puná.”

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PÁNSE.

“Signature of Bapuráv Krishṇa Pánse,

[Attestations.]

his own handwriting.”

1867.  
PA'NSE  
v.  
PA'NSE.

The Assistant Agent, in deciding against the plaintiff, recorded the following judgment :—

“It has been ruled on several occasions by the Sadr Diváni Adálat, that Act VI. of 1849 is applicable to political pensions of the kind now enjoyed by the defendant. By Sec. 3 of that Act : ‘All assignments, agreements, orders, sales, and securities of every kind, made by any such pensioner, in respect of any money not payable at or before the making thereof, on account of any such pension, or for giving or assigning any future interest therein, are null and void.’ The money now claimed was due in 1865 ; whereas the agreement sued on was passed in 1862. It seems to me clear, then, that this agreement is invalid.

“It is, however, urged by the plaintiffs, that they have a right to a share in the pension ; that they would have established that right before, by an action in the Civil Courts, if the defendant had not passed this agreement ; and that Sec. 3 of the Act merely refers to transactions between the pensioner and his creditors. I cannot now decide what right the plaintiffs may have as shareholders, or whether the Civil Court can under any circumstances enforce a division of a pension. The suit has been brought on the agreement, and by that agreement the plaintiffs’ case must stand or fall. So far as the agreement is concerned, the plaintiffs stand in the position of creditors of the defendant to the amount of Rs. 60 odd per annum ; and by the above Act the pension is exempted from seizure under process of law, and any assignment of any portion of it is declared null and void. I do not see how the third section can be read in any other way ; and I must, therefore, decide against the plaintiffs.”

On appeal, the Agent concurred with the Assistant Agent in holding the document (exhibit No. 3) to be null and void, under the provisions of Act VI. of 1849, Sec. 3.

The case was heard by COUCH, C.J., and WARDEN, J.

*Dhirajlál Mathurádáv*, for the appellant, cited *Ex parte Vilhalráv bin Eshwantráv*, decided on the 14th of November

1863 (a), and *Ex parte Harbhaṭ bin Rámchandrabhaṭ*, decided on the 24th of November 1864 (b); and contended that Act VI. of 1849 did not apply.

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v.  
PA'NSE.

*Vishvanáth Náráyan Mandlik*, for the respondent, contended that the grant of this pension was personal, and, therefore, collaterals were not entitled to share in it.

COUCH, C.J.:—The agreement, No. 3, shows that the pension was assigned in 1856, in lieu of a saranjám held by the defendant's grandfather; and that a compromise was made of the claim which the plaintiffs had to a share of the pension.

This is not a pension granted in “consideration of past services and present infirmities or old age;” and does not come within the terms of Sec. 2 of Act VI. of 1849. The cases cited for the appellant are in point.

We, therefore, reverse the decrees of both the lower courts; and award the plaintiff the amount sued for, with costs.

*Appeal allowed.*



*Civil Petition.*

*Ex parte VITHALRA'V ESHWANTRA'V.*

*Pension—Attachment—Act VI. of 1849.*

18/21

On petition praying that an attachment placed on a pension, of which petitioner was the recipient, might be removed, under Act VI. of 1849, the High Court declined to interfere; as it had not been shown that the pension was one enjoyed in consideration of past services and present infirmities or old age.

THE petitioner represented that Dáji Mahádev Athavale, having obtained an arbitration award against him for the sum of Rs. 1,651, sued out execution of the same, by praying for the attachment of, and payment to himself of, a portion of a pension paid periodically to the petitioner from the treasury of the Collector at Puná; that the District Judge complied with this prayer, and directed that a specific portion of the said pension be attached and paid over to the said creditor; that this order for attachment was contrary to law,

(a) *Next case.*

(b) *Post, p. 67.*

1863.

*Ex parte*  
VITHALRÁV  
ESHWANT-  
RAV.

and the provisions of Act VI. of 1849 ; and the petitioner therefore, prayed the same might be annulled, and his pension declared exempt from attachment.

On hearing the petition, the High Court directed the District Judge to ascertain, by reference to the revenue and inám authorities if necessary, when and by whom the pension referred to was granted ; whether it had been enjoyed by any of the petitioner's ancestors, and, if so, for how long, and on what account ; and to transmit a copy of his order directing the pension to be attached ; and to state whether there had been any prior orders of attachment against the same, and, if so, to specify their dates.

The Judge reported as follows :—

“ It appears, from the report of the Alienation Settlement Officer, that after the conquest a pension of Rs. 2,000 was granted by the British Government in 1819 to Eshwantráv, the father of the petitioner. The grant appears to have been made either from motives of policy, or because the grantee had been of service to the British Government.

“ On Eshwantráv's death, in 1827, the pension was continued to his two sons, Anandráv and Vithalráv (the petitioner), in equal shares. Anandráv having died on the 17th of June 1861, a portion (Rs. 240) of his share was continued to his widow ; and the remainder lapsed to Government. The petitioner is in the enjoyment of his share of the pension, Chandore Rupees 1,000, or Queen's coin Rs. 955-3-4.”

The Judge at the same time forwarded a copy of the order of attachment, and stated that there had been prior attachment in 1853, when Rs. 87-8-0 were deducted and paid over to a creditor of the petitioner.

PER CURIAM (ERSKINE, NEWTON, and WESTROPP, JJ.) :— As the petitioner has not shown that the pension is one enjoyed for past services rendered by him, and in consideration of his infirmities or old age, the Court will not interfere with the order of attachment.

*Petition rejected.*

*Civil Petition.**Ex parte* HARBHAT BIN RA'MCHANDRABHAT.1864.  
Nov. 24.*Pension—Attachment—Act VI. of 1849.*

An order made by a District Judge, rejecting an application to attach a pension,—on the ground that, being a Political pension, it could not be attached, under Act VI. of 1849—was reversed, on petition, by the High Court, which directed the pension to be attached.

THE petitioner, on the 11th of January 1858, by an arbitration award, obtained a decree against Lakshmibai, alias Tánibái, kom Venkátráv Patnir; and on the 29th of March 1864 recovered by attachment, from the defendant's pension, the sum of Rs. 3,892-7-0, being the amount for five years.

He subsequently applied, by darkhást, to the Acting Judge of Dhárwár, to have the pension for 1863-64 attached in the same way. The Judge then addressed the Collector of Belgaum, who replied that, as the pension was a political one, it could not, under the orders of Government Letter, and Act VI. of 1849, be attached. The Judge made an order, accordingly, rejecting the application, on the 20th of April 1864.

Against this order Harbhat presented a petition to the High Court, on the 27th of July 1864; and obtained a *Rule nisi* calling upon the opposite party to show cause why the arrears of pension due for 1863-64 should not be attached.

The case came on for hearing, on the 19th of July, before ARNOULD, Acting C.J., NEWTON and TUCKER, JJ.

The opposite party did not appear.

PER CURIAM :—The Court reverses the order of the Judge; and directs the pension to be attached.

*Application granted.*

1867.  
March 27.*Special Appeal No. 90 of 1867.*

SUNDAR JAGJI'VAN ..... *Appellant.*  
 GOPÁL ESHVANT ..... *Respondent.*

*Mortgage—Registration—Purchase—Priority.*

*Held* that a registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser.

THIS was a special appeal from the decision of S. H. Phillips, Acting Assistant Judge of the Konkan District, in Appeal Suit No. 327 of 1866, confirming the decree of the Munsif of Pen.

Sundar Jagjivan brought the suit, to enforce a mortgage lien on the property of one Devji; the attachment on which was removed on the application of Gopál Eshvant, the defendant, who, in answer to the plaintiff's claim, alleged: that Devji and his son had mortgaged the property to him; that, on Devji's death, his son sold it to him; and that he was in possession.

The Munsif of Pen rejected the claim: finding that the plaintiff did not prove his case; and that the purchase of the property by the defendant was proved.

The Acting Assistant Judge found, on the authority of Special Appeals Nos. 23 and 75 of 1861 (a), that Gopál Eshvant, the defendant, being a purchaser with possession, was not liable for an equitable mortgage lien.

*Dhirajlál Mathurádás*, for the appellant, contended that, inasmuch as the mortgage bond passed to the plaintiff by Devji was dated the 22nd of March 1851, and registered on the 19th of October 1859, and not denied, the plaintiff had a lien on the property; and that the defendant purchased it on the 12th of March 1855, subject to that lien. The cases relied upon by the Court below, in support of its judgment, only went to show that an unregistered mortgage without possession was not valid against a subsequent purchaser

(a) 8 Bom. S. D. A. Dec., pp. 189 and 264.

with possession. Here the deed of mortgage was registered. The following cases were cited : *Rambuggut v. Sudanundrao* (b) ; *Purshotum Runchord v. Jugjivan Mayaram* (c) ; S. A. No. 364 of 1865 ; and S. A. No. 129 of 1866.

1867.  
SUNDAR  
JAGJIVAN  
v.  
GOPAL  
ESHVANT.

No one appeared for the respondent.

PER CURIAM (COUCH, C.J., and WARDEN, J.) :—The Court remands the case to the lower appellate court, for the Judge to try and determine whether the alleged mortgage was made to the plaintiff; and, if he shall so find, to pass a decree in favour of the plaintiff, who, as a registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser ; and the Court directs the costs to follow the final decision.

*Suit remanded.*

Special Appeal No. 93 of 1867.

March 27.

GANPAT BAJA'SHET ..... *Appellant.*  
KHANDU CHA'UGSHET and others ..... *Respondents.*

*Mortgage—Registration—Purchase—Priority.*

*Held* that an unregistered mortgage without possession is not valid against a purchaser with possession.

THIS was a special appeal from the decision of S. H. Phillips, Acting Assistant Judge of the Konkan District, in Appeal Suit No. 322 of 1866, reversing the decree of the Munsif at Alibág, in Original Suit No. 436 of 1866.

Ganpat sued to recover Rs. 148, the balance of a mortgage bond, from certain property in the possession of the defendant Tulsidás, which had been mortgaged to him (17th January 1863) before it was sold (20th January 1865) by the defendants Khandu and Lakshmi to the defendant Tulsidás. The deed of sale was registered. The mortgage was not registered.

Amrit Shripat, Munsif at Alibág, awarded the claim : holding that the defendant Tulsidás bought the property in question burdened with the plaintiff's lien as mortgagee over it.

(b) Bellasis, Rep. 9.

(c) 1 Bom. H. C. Rep. 60.

**1867.** On appeal, the Acting Assistant Judge reversed the Munsif's decree, on the ground that a mortgage without possession was invalid against a purchaser with possession :  
**GANPAT BAJA'SHET v. KHANDU CHA'UGSHEt et al.** S. A. Nos. 23 and 75 of 1861. (a)

*Dhirajlál Mathurádás*, for the appellant, contended that the old Registration Law simply gave priority to registered documents ; but left it entirely to the option of the parties to register their documents. The plaintiff, in consequence of his not having registered the mortgaged deed, could not be prevented from charging the property in question with his lien.

*Bhairavanáth Mangesh*, for the respondent, besides the cases referred to by the Assistant Judge, cited S. A. No. 970 of 1864, and S. A. No. 85 of 1865.

Couch, C.J.:—The Acting Assistant Judge was right in holding that an unregistered mortgage without possession was not valid against a purchaser with possession.

We therefore affirm his decree with costs.

WARDEN, J., concurred.

*Special Appeal No. 528 of 1866.*

April 10.

SA'KALCHAND SAVA'ICHAND.....Appellant.  
DAYA'BHA'I ICHHA'CHAND .....,Respondent.

*Gift of land—Permissive occupancy—Title.*

A donee, under a deed of gift, brought a suit to recover a piece of land which, he alleged, his donors had given for a temporary purpose to the defendant in possession six years before; and the Munsif found that it was so, and allowed the claim. But the District Judge, in appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree.

*Held* that the Judge was in error in requiring the plaintiff to establish the title of the donors, without inquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on that point.

THIS was a Special Appeal from the decision of C. G. Kemball, Acting Judge of the Sûrat District, in Appeal Suit No. 80 of 1866, reversing the decree of the Munsif of Sûrat in Original Suit No. 1433 of 1865.

(a) 8 Bom. S. D. A. Dec., pp. 189 and 246.

The following judgment was recorded in the District Court :—

“This action was against the present appellant (Dáyábháí) and two brothers, Nemchand and Khemchand, to recover possession of a piece of land alleged to have been given by the two latter to the plaintiff; and plaintiff's case was that the land was originally bought by one Joti, the mother of the abovenamed brothers, in A. D. 1835, and that it was conveyed in gift to him by the latter in 1865. In proof of the purchase by Joti, a kabálá in the Persian character is produced in court, the seal on which is torn, but which, the Maúlavi, witness No. 31, says, may be the seal of a former Kázi, Hussan Alí.

1867.  
SA'KALCHAND  
SAV'ATCHAND  
v.  
DAYA'BHA'I  
ICHHA'CHAND.

“Defendant Dayábháí Ichháchand pleaded, and also subsequently maintained on solemn affirmation, that the land in question had been in his possession for the last twenty years, and was his property. I have read over the evidence, and must express my surprise at the conclusion arrived at by the Munsif.

“It is admitted that the defendant has been in undisturbed possession for the last six years; and therefore he is in law to be considered as the owner of the land, until the contrary be proved: but the Munsif appears to have lost sight of this fact, and the rule that necessarily follows therefrom, that the plaintiff must recover possession, if at all, by the strength of his own, and not by the weakness of the defendant's, title.

“Instead, however, of deciding on the merits of the case deducible from the evidence, the Munsif, apparently thinking it necessary to supply a deficiency observable in the plaintiff's case, issued a commission, with what legitimate object it is difficult to understand, for the dispute was not one in which personal inspection could possibly affect the question at issue. I think it unnecessary to consider here in detail the evidence offered by the plaintiff and that taken by the Commission. It is sufficient for me to remark that, as regards the kabálá, it is no proof at all of the title of the

1867. SA'KALCHAND persons through whom the plaintiff claims, for, the land SAVA'ICHAND specified may be any land, as the document is not proved; and v. DAYA'BHAI' as regards the oral testimony, it is quite as strong in favour ICHHA'CHAND. of the defendant as in that of the plaintiff. What object the plaintiff could have in joining the persons through whom he claims as defendants with the appellant, it is not easy to see, unless it was with a view to establish by a side-wind, *i. e.*, with their admission, that which otherwise he felt was hopeless. Khemchand's statement I look upon as most unsatisfactory.

" I consider that the Munsif, on improper and insufficient evidence, admitted the plaintiff's right to eject the defendant. The decree of the lower court is, therefore, reversed with costs on the respondent."

The case was heard before COUCH, C.J., NEWTON and WARDEN, JJ.

*Pigot, Reil, and Dhirajlál Mathurádás* for the appellant.  
*Nánábhái Haridás* for the respondent.

COUCH, C.J. :—The case put forward by the plaintiff was, that the land in dispute belonged to Khemchand and Nemchand; that they, or one of them acting for both, had permitted the defendant to use it for a temporary purpose some six years ago; and that they subsequently made over the land to the plaintiff by a deed of gift. There appears to have been sufficient evidence in support of this case: and the Munsif appears to have been satisfied with the evidence as to the defendant's holding the land by permission of Khemchand; nor does the defendant seem to have denied that fact.

The District Judge, however, instead of raising and trying this, which was the real and most material issue between the parties, *viz.*, the right by which the defendant held the land in dispute, considered that the plaintiff was bound to prove his donors' title, without regard to the circumstances under which the defendant had obtained possession, and whether it was adverse or not.

If, as was alleged by the plaintiff and found by the Munsif, the defendant took possession by the permission of Khem-

chand about six years ago, he was not at liberty to impeach the plaintiff's title, which was derived from Khemchand. As the District Judge in appeal has not inquired into the truth of this allegation, the case must be remanded for his finding upon it ; and if he finds it in the affirmative, he should affirm the Munsif's decree.

1867.  
SA'KALCHAND  
SAVA'ICHAND  
v.  
DAYA'BHA'I  
ICHHA'ICHAND.

We order the costs to follow the final decision.

*Decree reversed and suit remanded.*

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*Special Appeal No. 61 of 1867.*

March 12.

RA'MCHANDRA DI'KSHI'T.....*Appellant.*  
SA'VITRIBA'I .....,*Respondent.*

*Hindú Widow—Maintenance—Contribution—Small Cause Court.*

A Hindú widow, who had been supported by her father-in-law, after his death sued his eldest son for maintenance, and obtained a decree for Rs. 150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed :—

*Held* that, as this was a Small Cause Court suit, an appeal did not lie.

The maintenance of a widow is, by Hindú law, a charge upon the whole estate, and, therefore, upon every part thereof.

The defendant might have the question raised by him decided, by suing his brothers for contribution.

THIS was a Special Appeal from the decision of F. Lloyd, Agent for Sardárs in the Dakhan, affirming, in appeal the decree of A. Daniel, Assistant Agent.

The original suit was brought by Sávitribái, the widow of Mahádev Díkshít, for arrears of maintenance for three years, from the 6th of December 1862 to the 6th of December 1865, at the rate of Rs. 100 a year : alleging that Moreshvar Díkshít, her husband's father, had supported her up to the date of his death, the 6th of December 1862 ; that the defendant, as eldest son, inherited Moreshvar's estate ; and that she had no means of subsistence.

The defendant (amongst other things) contended that, as he was one of three brothers, the suit did not lie against him alone.

1867.

RAMCHANDRA  
DI'KSHI'T  
v.  
SA'VITRIBA'T.

The Assistant Agent held the plaintiff entitled to maintenance, at the rate of Rs. 50 per annum, and passed a decree for Rs. 150.

The plaintiff appealed to the Agent, on the ground that the sum awarded was not sufficient for her maintenance. The defendant also appealed, on the ground that his two brothers, who shared with him the hereditary estate, should have been made parties; and that he was not liable for the whole of the subsistence allowance awarded to the plaintiff, but only for his one-third share thereof.

The Agent held that the amount, though small, was a fair one under the circumstances, and confirmed the lower court's decree.

*Vishvanáth Náráyan Mandlik* for the appellant.

*Pándurang Balibhadra* for the respondent.

COUCH, C.J.:—By Hindú law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof. The special appellant is liable for the maintenance.

He may sue his brothers for contribution; but we cannot now decide that question, which would properly arise in a suit between the appellant and his brothers.

However, as this is a Small Cause Court suit, no appeal lies to this Court.

NEWTON, J., concurred.

*Appeal dismissed with costs.*

NOTE.—A suit by a co-sharer for contribution in respect of Government revenue paid by him in excess of his own quota, is not cognisable by a Small Cause Court; as the extent of the share in respect of which contribution is sought cannot be determined without deciding a question of title: *Kaleenath Roy v. Nilaram Puramanick, per Peacock, C. J., and Jackson, J.; 7 Calc. W. Rep. Civ. R. 32.*—ED.

*Referred Case.*1867.  
July 17.

JUDAL kom RANCHHOD MU'LJI ..... *Plaintiff.*  
 HIRA' MU'LJI ..... *Defendant.*

*Hindú Widow—Maintenance—Small Cause Court.*

*Held* that a suit for maintenance by a Hindú widow is cognisable by a Court of Small Causes in the Mofussil.

CASE referred for the decision of the High Court, under Sec. 22 of Act XI. of 1865, by Gopálráv Hari Deshmúkh, Judge of the Small Cause Court at Ahmedábád.

“ In Case No. 840 of 1867 in this court, the plaintiff has sued her brother-in-law, the defendant, for Rs. 60, on account of maintenance for a year, at Rs. 5 per month, which she says the defendant is obliged to give her, according to Hindú law, after the death of her husband.

“ The defendant states that this claim, being essentially one of the right to maintenance, ought not to be tried in this court.

“ My opinion is, that such suits as these are not cognisable by this court: because they necessarily involve intricate inquiries into law and the custom of the caste to which the parties may belong; and because, though it is a claim for money, it does not come within the scope of Sec. 6 of Act XI. of 1865, which mentions only claims for money due on a bond or other contract.”

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—A suit for maintenance lies in a Court of Small Causes in the Mofussil, as determined by this Court, on the 12th of March 1867, in S. A. No. 61 of 1867: *Ramchandra Díkshít v. Sávitribái.*

1867.  
July 17.

*Referred Case.*

GULAWAD CHANDA'BHA'I ..... Plaintiff.  
RAHIMTULLA' JAMA'LBHA'I ..... Defendant.

*Act VIII. of 1859, Sec. 206—Adjustment of Decree out of Court—Suit to recover a thing given in satisfaction—Small Cause Court.*

*Held* that the rejection, under Sec. 206 of Act VIII. of 1859, of a defendant's objection, in a Mofussil Small Cause Court, to the execution of a decree, on the ground that it had been adjusted out of court, did not bar his right to bring a suit against the execution creditor, to recover the thing alleged to have been given in satisfaction of the decree.

CASE referred for the decision of the High Court, by Gopálráv Hari Deshmúkh, Judge of the Small Cause Court at Ahmedábád, under Sec. 22 of Act XI. of 1865.

“ Rahimtullá, the defendant, obtained a decree in this court, in Case No. 171 of 1864, for Rs. 50 and costs, against Gulawad, the present plaintiff. Rahimtullá executed the decree on the 15th of December 1866, when Gulawad stated that he had given Rahimtullá a gold kanthi or necklace worth Rs. 52, out of the court, in satisfaction of the decree. The objection was overruled ; and he paid the whole sum due on the decree.

“ Gulawad has now sued Rahimtullá, in Case No. 373 of 1867, for the restoration of the gold kanthi, which, he alleges, Rahimtullá received in satisfaction of the former decree. Rahimtullá denies the acceptance of the kanthi ; and pleads that an assertion, which was once rejected, under Sec. 206 of Act VIII. of 1859, cannot form the subject of a new suit. (a)

“ Rahimtullá applies to have the point referred for the decision of the High Court.

(a) Sec. 206 :—“ All monies payable under a decree shall be paid into the Court whose duty it is to execute the decree, unless such Court, or the Court which passed the decree, shall otherwise direct. No adjustment of a decree, in part or in whole, shall be recognised by the Court ; unless such adjustment be made through the Court, or be certified to the Court by the person in whose favour the decree has been made, or to whom it has been transferred.” And see *Ex parte Chimndáji Bálkrishna*, *post*, p. 85.—ED.

“ The question, therefore, is whether Gulawad has a right 1807.  
GULAWAD  
of action for the recovery of the kanthi said to be given by  
CHANDA'BHA'I  
him in satisfaction of a decree, an assertion, which, when  
v.  
the decree was in the course of execution, was overruled,  
RAHIM'TULLA'  
under Sec. 206 of Act VIII. of 1859. JAMA'L BHAI.

“ My opinion is that Gulawad has a right of action, because such an action does not appear to have been prohibited by any enactment.”

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The Court are of opinion that the rejection, under Sec. 206 of Act VIII. of 1859, of the claim by the plaintiff—that the decree had been satisfied by giving the defendant the gold necklace—does not bar his right to bring the present suit.

—♦—♦—  
*Referred Case.*

July 24.

RAVICHAND DALICHAND ..... *Plaintiff.*  
MOTILA'L NARBHERA'M ..... *Defendant.*

*Act VIII. of 1859, Sec. 194—Payment by Instalments—Order for, subsequent to Decree—Review—Small Cause Court.*

*Held* that, when the not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice, the Court which passed the decree has power to review it, and to make an order for payment by instalments. Otherwise the Court has no power to make such an order subsequent to the decree, without the consent of the judgment creditor.

**C**ASE referred for the decision of the High Court, under Sec. 1 of Act X. of 1867, by Gopálráv Hari Deshmúkh, Judge of the Court of Small Causes at Ahmedábád.

“ In Suit No. 716 of 1867, a decree was given for the plaintiff, on the 17th of May 1867. The defendant, Motilál Narbherám, has, on the 18th of May 1867, presented a petition for a review of judgment: asking the Court to order the amount of the decree to be paid by instalments; and stating that if a petition for review is not admissible on that ground, it may be treated as a miscellaneous petition for an order of payment by instalments.

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"The question is whether an order for instalments can be given under any circumstances, after the judgment has been pronounced.

"If I recollect rightly, I think the Bombay Small Cause Court, in rare cases, makes orders for instalments after the days on which judgments are given. If any one makes such a petition there to the Full Court, he is told that not asking for instalments is no ground for review [a new trial]; but he must apply to the Judge who decided his case, and that he would consider the matter.

"Sec. 194 (a) of Act VIII. of 1859, which authorises the court to make the order, occurs under the head of 'Judgment and decree'; hence the presumption is that the order should be a part of the decree. If the decree is not written up to the time the order is made, it may be possible to make it a part of the decree; but otherwise there will be a difficulty.

"My opinion is that it may be necessary to make the order in a rare case indispensably requiring this mode of redress; but that generally no court ought to make an order for instalments, after it has pronounced judgment.

"I have recently found a case which will bear out my opinion. (b)

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The Court are of opinion that, when the not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice that such an order should be made, the court passing the decree has power to review it, and to make an order for payment by instalments; but that it cannot be done in other cases, unless the judgment creditor consents.

(a) Sec. 194:—"In all decrees for the payment of money, the Court may, for any sufficient reason, order that the amount shall be paid by instalments with or without interest."

(b) 1 Calc. W. Rep., Mis. Civ., 6.

*Referred Case.*1867.  
Sept. 26.

SHANKAR BA'PU ..... *Plaintiff.*  
 VISHNU NA'RA'YAN and others ..... *Defendants.*

*Mortgage—Registration—Surety—Act XIV. of 1864, Sec. 13.*

In a suit against a principal and two sureties, to recover the amount advanced on a bond by which certain immoveable property was mortgaged, one of the sureties appeared, and contended that he was discharged from his liability, in consequence of the plaintiff's neglect to have the bond registered :—

*Held* that the surety was discharged, as he could only be liable by virtue of the mortgage bond, which, being invalid for want of registration, could not be used against him.

The principal, however, might be sued as for money lent, if the loan could be proved by other evidence.

**C**ASE referred for the decision of the High Court, under Sec. 1 of Act X. of 1867, by Janárdan Vásudevji, Judge of the Small Cause Court at Puná.

“ In this suit one Shankar bin Bápu sues one Vishnu bin Náráyan as principal, and two others as sureties, on a mortgage bond, dated the 14th of December 1865, for Rs. 230, abandoning his lien on the house which was mortgaged.

“ One of the defendants, Mahádev, only enters appearance, and pleads :—(1) That the mortgage bond has not been registered, and that, therefore, under Sec. 13 of Act XVI. of 1864, which was then in force, it cannot be enforced ; (2) that he, defendant Mahádev, being one of the sureties, is discharged from his liability, in consequence of the plaintiff's neglect to have the mortgage registered.

“ In regard to the first point taken by defendant Mahádev, the section of the Registration Act relied upon by him appears to me decisive. Under it no instrument creating, transferring, or extinguishing any right, title, or interest of the value of Rs. 100 or upwards in any immoveable property can be admitted in evidence, unless it has been duly registered. The mortgage bond in question, creating as it does an interest in immoveable property of the value of upwards

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of Rs. 100, cannot, therefore, for want of registration, be admitted in evidence to prove the contract of mortgage, and cannot, consequently, be declared upon, as is done in this suit.

“ The Registration Law, however, does not visit the omission to register with a forfeiture of the consideration for which an instrument is executed. I am, therefore, of opinion that the plaintiff can recover, on the common money count, the amount of the loan or debt for which the mortgage bond in question has been executed; and this he may be allowed to do in the present action by amending the plaint; but whether in that case he can use the mortgage bond simply to show the fact of the money having passed, or of the existence of the debt for which it was executed, is a point on which I feel doubtful.

“ Adverting to the second question raised by defendant Mahádev, I am of opinion that the mortgage bond, being incomplete, inasmuch as it has not been registered as required by the law, is not binding on any of the parties to it. Besides, defendant Mahádev is one of the sureties, and a surety is, under the English Law, discharged from his liability when he is deprived of the benefit of the security which the creditor held. In this case the sureties have been deprived of the benefit of the security which the contemplated mortgage would have afforded for the payment of the debt, if it had been registered according to law. The omission in this respect, applying the principles of the English Law to this case, would go to discharge defendant Mahádev and the other surety from their liability.”

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The mortgage cannot be used to prove the loan of the money; but if the loan can be proved by other evidence, the party, by whom the money was received, may be sued for it as for money lent.

But the defendant Mahádev appears to have been only a surety, and not himself to have received any portion of the money; and is, consequently, liable only by virtue of the mortgage bond, which, being invalid, cannot be used against him.

## Referred Case.

1867.  
July 25.

BULKIRÁ'M NATHURA'M ..... Plaintiff.  
 THE GUZERAT MERCANTILE ASSOCIATION,  
 LIMITED, and others ..... Defendants.

*Judgment inter partes, when conclusive—Pendency of Appeal—Decree,  
 Staying Execution of—Review.*

*Held* that a former judgment, by a court of competent jurisdiction, upon the same cause of action, was conclusive between the same parties, in a subsequent suit brought in another court, notwithstanding the pendency of an appeal against it; but that the Judge passing a decree in the subsequent suit might, upon application made to him, and security being given, stay the execution of it, until the appeal in the former suit was decided, and might, if the decree in the former suit was reversed, entertain an application for the review of his own decision in the subsequent suit.

CASE referred for the decision of the High Court, under Sec. 22 of Act XI. of 1865, by Gopálráv Hari Deshmukh, Judge of the Small Cause Court at Ahmedábád.

“ In Suit No. 891 of 1867, the plaintiff, Bulkirám Nathurám, claims from the Guzerat Mercantile Association, Limited, and others, salary, at Rs. 200 per mensem, for four months, from 14th December 1866 to 13th April 1867.

“ He has produced a decree, which he obtained in the Principal Sadr Amín’s Court, for the salary due to him for some months previous to the 14th of December 1866; and urges that the case should be decided on the strength of that decree, without further investigation.

“ The relation between the plaintiff and the defendants is, that the defendants started a company in Ahmedábád, and wrote to the plaintiff to take its management for five years on a salary of Rs. 200 per month. The company proved a failure before the plaintiff could be set to work. He is now prosecuting the defendants for his salary. He sued them once, in the Principal Sadr Amín’s Court, to recover wages for five years, the period agreed upon, and succeeded in obtaining a decree for his wages for eighteen months only, on

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the ground that the whole period had not then expired ; and then, in the Ṣadr Amín's Court, for the succeeding four months, which he lost, on the preliminary ground that the action was not properly brought, inasmuch as the suit was based upon the Principal Ṣadr Amín's decree, and not upon the contract. Both the decrees are under appeal. He now brings this court a suit to recover wages for the next succeeding four months.

“ The Principal Ṣadr Amín raised the following issues :— (1) Whether the defendant Tribhuvan did enter into a contract with the plaintiff to employ him for a period of five years, on a monthly salary of Rs. 200, as manager of the Guzerat Mercantile Association ; (2) whether the said Tri-bhuvan (director of the Guzerat Mercantile Association) had authority to bind the said association by such a contract ; (3) whether the company is liable for the claim ; (4) whether each of the six defendants sued by name is personally liable for the amount claimed ; and (5) whether the plaintiff has a cause of action for the whole amount claimed.

“ The Principal Ṣadr Amín found the first four issues for the plaintiff ; and disposed of the last by decreeing that the plaintiff had then no cause of action to recover the whole amount claimed, but might in future sue the defendants, in the event of their not continuing him in their service.

“ The action now pending in this court is to recover so much as has become due up to the date of the suit.

“ The defence raised in this court is mainly the same as that raised in the Principal Ṣadr Amín's Court, viz., that there was no contract binding on the defendants to keep the plaintiff in employment for five years ; and that Tribhuvan, the managing director, had no authority to bind the company. The defendants also contend that the plaintiff cannot sue upon the Principal Ṣadr Amín's decree, but that he must sue on the alleged contract.

“ The plaintiff, Bulkirám, contends that no fresh investigation can now take place, in this or any other original court, respecting these questions, inasmuch as they have been

adjudicated upon in a court of competent jurisdiction between the same parties; and further urges that were the Court to enter into the merits of the case, the issues, that would be raised for decision, would necessarily be substantially the same as those raised in the Principal Ṣadr Amín's Court: Taylor on Evidence, § 1507 (a), while *the same evidence would sustain both*: *Ibid.*, § 1512. (b) The first decree is, consequently, a bar to all future inquiry respecting matters therein determined.

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“ The defendants contend that the whole question should be entered into, and that the Principal Ṣadr Amín's decree cannot be considered conclusive, as it is not final, and has been appealed against by the defendants. The decision in appeal will not be known for some time, and there may be a special appeal afterwards. They cite Norton on Evidence, pp. 71 and 137, which says: ‘Secondly, it must be a final, and not a mere interlocutory, judgment.’

“ The defendants further argue that after the Principal Ṣadr Amín gave a decree in favour of the plaintiff, the plaintiff filed another action in the Ṣadr Amín's Court; and it was thrown out, on the ground that the plaintiff could not sue, as he did, upon the Principal Ṣadr Amín's decree, but that he must have sued upon the contract itself. The plaintiff had produced no proof, except a decree of the Principal Ṣadr Amín in his favour, in the Ṣadr Amín's Court.

“ The defendants also urge that the cause of action, though similar in nature, is different in time.

“ In reply, the plaintiff states that the Principal Ṣadr Amín's decree, though appealable or appealed against, does not require confirmation from a superior court to give it the force of a decree; and that it should be considered as having full force, until it has been *actually* reversed by a higher tribunal. And in support of this position the plaintiff cites Taylor on Evidence, § 1531: ‘ It is not equally obvious, though the law on the subject is now settled, that the

(a) 4 Edn., p. 1429.

(b) *Ibid.*, p. 1434.

1867. *pendency of proceedings in error or on appeal will not prevent the judgment from operating as a bar.* (c)

**GUZERAT MERCANTILE ASSOCIATION et al.** “Respecting the fact of the plaintiff's second suit being dismissed by the Sadr Amín, on the ground that the plaint was based upon the Principal Sadr Amín's decree, and not upon the contract ; he argues that that decision of the Sadr Amín is not conclusive, as it proceeded only on a technical point ; and cites Taylor on Evidence, § 1528, where it is said : ‘Further, a judgment is inconclusive, if it appears that the decision did not turn *upon the merits* ; as, for instance, if the trial went off on a technical defect, or for faults in the declaration or pleadings, or because the action was misconceived, or because the debt was not then due, or because of a temporary disability of the plaintiff to sue, or because the plaintiff had mistaken his character, and had sued as executor instead of administrator, or the like.’ (d)

“ The question, therefore, is, whether a decree which is appealed against should be received as conclusive evidence on points determined by it.

“ My opinion is that it should not be so received.”

The case was heard before COUCH, C.J., NEWTON and WARDEN, JJ.

*A'tmáram Jagannáth*, for the plaintiff, argued that the decree of the Principal Sadr Amín was conclusive, so long as it was not reversed, between the same parties ; and that, therefore, the defendant could not take exception to it and open the case *de novo*. He relied upon the passages from Taylor on Evidence as cited for the plaintiff in the court below.

*Nánábhái Haridás*, for the defendant, argued that the decree was not conclusive ; and that, if it were held to be conclusive, great mischief would follow in case it were reversed : for the Small Cause Court would have had to rely

(c) 4th Edn., p. 1452 : citing *Doe v. Wright*, 10 A. & E., 763 ; *Munroe v. Pilkington*, 31 Law J., Q. B., 81.—Ed.

(d) 4th Edn., p. 1450.

upon a decree which was bad ; and also because the plaintiff would thereby harass the defendant by a multiplicity of suits. The passage cited from Taylor was doubtful.

COUCH, C.J. :—The passage quoted from Taylor on Evidence is not, I am afraid, happily expressed, and may perhaps have caused some doubt in the mind of the Judge. The authorities show, as Mr. Taylor says, that the pendency of proceedings in error or in appeal does not prevent a decree being conclusive *at the time*.

PER CURIAM :—The Court are of opinion that the decree of the Principal Ṣadr Amín is conclusive in the present suit, notwithstanding the pendency of the appeal ; but if the Judge passes a decree for the plaintiff, he may, upon application made to him, and security being given, stay the execution of it, until the appeal is decided ; and if the decree of the Principal Ṣadr Amín should be reversed, may entertain an application for the review of his decision.

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*Civil Petition.*

Jan. 7.

*Ex parte CHIMNA'JI BA'LKRISHNA.*

*Execution of Decree—Adjustment out of Court—Act VIII. of 1859, Sec. 206.*

*Held*, that Sec. 206 of Act VIII. of 1859 does not apply to adjustments of decrees made before the Act came into operation.

IN the case of a decree against a principal and a surety, the surety paid part of the amount before the Code of Civil Procedure came into operation ; but the District Judge, on an application to execute the decree, refused to recognise such payment, as it had not been made through the court.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—Sec. 206 of Act VIII. of 1859 does not apply to adjustments made before the Act came into operation.

We, therefore, reverse the order of the Judge ; and direct him to re-hear the application for execution of the decree.

*Application granted.*

1867.  
Jan. 24.

## Civil Petition.

D. A. DALVI, a minor, by his mother and  
guardian, NIRA'BA'I.....*Petitioner.*  
LAKSHUMAN HARI PA'TI'L .....*Opponent.*

*Execution of Decree—Application for—Bonâ fide Proceeding within preceding three years—Non-payment of Battâ—Act XIV. of 1859, Sec. xx.*

A District Judge having held that an application to execute a decree did not prevent the operation of Sec. xx. of Act XIV. of 1859, it having been struck off because the applicant did not pay *battâ* :—the High Court reversed the order, and directed the Judge to determine whether the former application to execute the decree was *bonâ fide*, notwithstanding *battâ* was not paid.

A DECREE was obtained by the applicant in the Court of the Munsif of Dahânu on the 15th of June 1860. Proceedings were taken to enforce it in 1862 ; and on the 24th of October 1865, a second application was presented, which was rejected by the Munsif, on the ground that it was barred by the law of limitation.

The petitioner then appealed to R. H. Pinhey, District Judge of the Konkan, who, on the 25th of July 1866, recorded the following order :—

“I reject this appeal. It is admitted that the applicant's *darkhâst* is time-expired, and barred by Sec. xx. of Act XIV. of 1859, unless the *darkhâst* of the appellant can operate to save the limitation. But I am of opinion that the appellant's former *darkhâst* cannot be held to have any such force. It was struck off, because appellant did not pay *battâ* ; and, therefore, the Court cannot call it a *bonâ fide* proceeding taken to enforce a judgment.

*Vishvanâth Nârâyañ Mandlik*, for the petitioner, on the 3rd of December 1866, obtained a *Rule Nisi* : calling upon the opposite party to show cause why the order of the District Judge should not be reversed.

The case was resumed this day before COUCH, C. J., and NEWTON, J.

**PER CURIAM** :—We reverse the order of the District Judge, and remand the case for him to determine whether the former application to execute the decree was *bond fide*, notwithstanding *battā* was not paid; and we refer him to the judgment of Sir B. Peacock, *C. J.*, in *Goordodass Anchlolee v. Modhoo Koondoo*. (a)

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—•—  
Civil Petition.

13361  
Feb. 28.

NA'RĀ'YANBHĀ'I LA'L BHĀ'I.....*Appellant.*  
GANGĀ'KRISHNA BA'LKRISHNA and another. *Opponents.*

*Execution of Decree—Joint Liability—Appeal—Review—Power of High Court under Reg. II. of 1827, Sec. v., Cl. 2—Act VIII. of 1859, Secs. 378 to 380—Act XXIII. of 1861, Secs. 11 and 38.*

The High Court should not, in the exercise of its extraordinary powers, give an appeal in a case where the law provides none.

Nor should the Court, in the exercise of those powers, interfere when such interference would have the effect of working an injustice.

A District Judge has power to review an order passed by him on appeal, in an application in the execution of a decree.

NA'RĀ'YANBHĀ'I sued Gangākrishna and Ratankrishna on a bond in the Court of the Principal Ṣadr Amīn at Sūrat, and obtained a decree against them in 1859 for the sum of Rs. 26,221-6-8.

On appeal by Gangākrishna, H. Hebbert, Judge of Sūrat, decided, on the 19th of February 1859, that it was not competent to the plaintiff, Nárāyanbháí, to sue upon the bond, (looking to the value of the stamp) for a greater amount than Rs. 20,000; concluding his judgment thus:—"Under this view the Court amends the decree of the Principal Ṣadr Amīn, so far as it has been appealed against, and directs that Gangākrishna pay to Nárāyanbháí Rs. 20,000, or make over the half-village of Moṭhā Varchá to him till he has realised that amount; the rest of Nárāyanbháí's claim is rejected."

Nárāyanbháí subsequently applied to the original court to execute both decrees, one against Gangākrishna for

(a) 6 Calc. W. Rep., Mis. R., 98.

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Rs. 20,000, and the other against Ratankrishna for the original amount decreed, and to make over, in the event of default of payment, the half-village to him until satisfaction of the decrees. The half-village of Mothá Varchá, to which Gangákrishna and Ratankrishna were jointly entitled, was subsequently given into the possession of Náriyáñbháí.

Gangákrishna then petitioned the Court of the Principal Sadr Amín to restore possession of the half-village, Náriyáñbháí having received his debt in full; but the Principal Sadr Amín found that the decree-holder was still entitled to receive Rs. 3,889-12-10; and considered that as Mr. Hebbert only altered the decree of the lower court with respect to Gangákrishna; therefore, as against Ratankrishna, Náriyáñbháí was still entitled to hold the half-village, until he recovered the full amount of Rs. 26,221-6-8, decreed by the original court against both the parties. Náriyáñbháí had also asked that interest should be allowed him on the amount of the original decree, and likewise the costs awarded to him in the original and appeal suits; but the Principal Sadr Amín refused the application, as no mention of interest was made in the decree, and as Náriyáñbháí had neglected to pray for execution in respect of the amount of costs awarded.

Against this decision of the Principal Sadr Amín both parties appealed to C. G. Kemball, Acting Judge of the Súrat District, who held that Náriyáñbháí, the plaintiff, could not execute his decree for more than Rs. 20,000 against either of the co-defendants in the original suit. The following is an extract from this judgment :—

“Any alteration of the judgment of the court of first instance in respect of one of the joint debtors must, from the very nature of the case, similarly affect that judgment as against the other. I, therefore, consider that the original decree, notwithstanding the remark of the Judge ‘so far as it has been appealed against,’ whatever those words may really mean, was amended by the judgment of the appellate court as against both the debtors.

“ On the second question, assuming that the original decree continued alive against Ratankrishṇa by the fact of his having failed to join in the appeal, it appears to me that the fact of the judgment against one of the judgment debtors having been satisfied, operated necessarily as a discharge to the other. Application was made for the execution of both decrees against the respective parties; and if it was right to comply with this application, it must be taken that both decrees were in course of satisfaction simultaneously. The decree for the smaller sum must, necessarily, be satisfied first; and, consequently, when that decree was satisfied, the larger decree became *per se* discharged. I imagine that if, on the judgment in appeal, Gangákrishṇa had at once paid up the Rs. 20,000, proceedings would have immediately been stayed against Ratankrishṇa on his pleading ‘judgment with satisfaction against Gangákrishṇa.’ The judgment in full having been satisfied against Gangákrishṇa in respect of the joint debt, I conceive it was competent to him to demand re-delivery of the security, which was also joint.

“ The amount of the rents and profits of the half-village having been ascertained to be Rs. 22,038-15-10, I find that the debt due to Náráyanbháí has been satisfied, and, therefore, order that possession of the half-village shall be delivered to the debtor Gangákrishṇa.

“ Náráyanbháí has no title to interest, and I do not see how he can now ask possession to be continued until his costs be recovered, seeing that he failed to enter the amount in his darkhást.

Application was now (Feb. 28) made to the High Court (COUCH, C.J., and NEWTON, J.) to set aside the Judge’s order as being illegal.

*Shántáram Náráyán* for the petitioner:—Ratankrishṇa, not having appealed to the District Court, cannot take advantage of the amendment made in the decree on the appeal of the other co-defendant. His not appealing to the District Court was tantamount to what may be called confessing

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1867. judgment. The decree against Ratankrishna stands, and

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If both had appealed, it would have been a different thing. The plaintiff then would have had the right of coming to the High Court on special appeal.

COUCH, C.J. :—If this case had been tried under Act VIII. of 1859, the District Judge would certainly have amended the decree as against both the defendants; for evidently the same reason that led him to amend the decree as against one, would have led him to do so as against the other; and the law would have authorised his doing so. It was, however, tried under the Regulations, and so the decree against Gangákrishna remained unaltered, he not having appealed.

But the liability of both in this case being joint, it would be inequitable to allow the plaintiff to execute a decree for Rs. 20,000 against one, and for Rs. 26,000 against the other.

This is not a case, then, in which we should exercise the extraordinary powers of the court to help the plaintiff; besides which, our interfering with the order of the lower appellate court would be equivalent to giving an appeal, in a case where the law has provided none. It may be that sometimes the Judge may be wrong, and yet we should not interfere. But in this case we certainly should not interfere, as the effect of our doing so would be to work an injustice.

*Petition rejected.*

March 7.

On the petition of Gangákrishna, the District Judge in this case reported that, a mistake having been committed, it was not competent for him to add to his order on the subsequent application of the petitioner.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—We are of opinion that, under Secs. 378 to 380 of Act VIII. of 1859, and Sec. 38 of Act XXIII. of 1861, the Judge has power to review his order. It was an order passed by the Judge on appeal in an application in the execution of a decree: Sec. 11, Act XXIII. of 1861.

Civil Petition.

1867.  
Feb. 7.*Ex parte DEVGIRGURU' SUMBHA'GIR.*

*Pauper Suit—Application from Rejection of Petition to sue—Act VIII. of 1859, Secs. 301, 302, and Sec. 17—Reg. II. of 1827, Sec. v., Cl. 2.*

*Held*, that Sec. 301 of Act VIII. of 1859—requiring the petition for permission to sue *in formâ pauperis* to be presented by the petitioner in person—is imperative; and must be held to control the provisions of Sec. 17 of the same Act.

THE petitioner being in custody in the Punâ Jail, under a sentence of five years' rigorous imprisonment, petitioned the Principal Sadr Amîn for permission to sue *in formâ pauperis*.

The petition was rejected, as it was not presented by the petitioner in person, in accordance with the provisions of Chap. v. of Act VIII. of 1859. (a)

This decision was affirmed, in appeal, by the District Judge.

The petitioner now applied under Reg. II. of 1827, Sec. v., Cl. 2.

PER CURIAM (COUCH, C.J., and NEWTON J.):—Sec. 301 of Act VIII. of 1859 is imperative; and must be held to control Sec. 17 of the same Act, which provides for applications and appearances to be made by the recognised agents of parties.

*Petition rejected.*

(a) Sec. 301:—“The petition shall be presented to the Court by the petitioner in person; but if the petitioner satisfy the Court that he is prevented by sickness from attending the court in person, or if the petitioner be a female who, according to the custom and manners of the country, ought not to be compelled to appear in public, the petition may be presented by a duly authorised agent who may be able to answer all material questions relating to the application, and who may be able to be examined in the same manner as the party represented by him might have been examined had such party attended in person.”

Sec. 302:—“If the petition be not framed or presented in the manner laid down in the last two preceding sections, the Court shall reject the petition.”

1867.  
June 13.

*Civil Petition.*

*Ex parte ALI'KHA'N U'MARKHA'N.*

*Death of Pleader—Dismissal of Appeal—Re-admission—Reg. II. of 1827, Sec. LIV., Cl. 2—Act VIII. of 1859, Sec. 347.*

The time allowed by Sec. 347 of Act VIII. of 1859, within which to apply for the re-admission of an appeal dismissed for default of prosecution, should not, where the appellant's pleader has died without his hearing of it, be counted as commencing, until the appellant has an opportunity of coming in under the provision of Reg. II. of 1827, Sec. LIV., Cl. 2.

A N appeal made by the petitioner in the District Court of the Konkan at Tháñá was dismissed for default on the 20th of October 1866.

The appellant's pleader had died on the 6th of September; but the appellant did not hear of it until after the appeal was dismissed. On the 29th of August the case had come back to the District Court by remand from the High Court.

After more than thirty days from the date of the dismissal, the petitioner applied to the District Judge to have the appeal re-admitted; but his application was refused.

The petitioner then (Jan. 14) applied to the High Court, and notice was ordered to be given to the opposite party.

PER CURIAM (COUCH, C.J., and NEWTON, J.):—Reg. II. of 1827, Sec. LIV., Cl. 2, provides that in case of the resignation, dismissal, or death of a pleader, proceedings in the suit shall be stayed for such time as the Court deems reasonable, to enable the party to transfer his power of attorney to another pleader.

The time allowed by Sec. 347 of Act VIII. of 1859, within which to apply for the re-admission of the appeal, should not be counted as commencing, until after the appellant had an opportunity of coming in under the provision of the Regulation.

The District Judge is, therefore, ordered to re-admit and hear the appeal.

*Application granted.*

Referred Case.

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March 7.

GREAVES and others v. BHAGVA'N TU'LSI.

*Municipal Commissioner—Public Servant—Acts done in Public capacity—Jurisdiction—Reg. II. of 1867, Sec. XLIII—Act XXVI. of 1850.*

*Held*, that a Municipal Commissioner, appointed under Act XXVI. of 1850, is a public servant within the meaning of Reg. II. of 1827, Sec. XLIII.; and that, consequently, a Munsif has no jurisdiction to try a suit brought against him for acts done in his public capacity.

**CASE** referred for the decision of the High Court, under Sec. 28 of Act XXIII. of 1861, by J. R. Naylor, Senior Assistant Judge of the Sûrat District, at Broach.

“ Bhagván Tûlsi brought a suit in the Court of Munsif No. 1 of Broach against the President and certain members of the Broach Municipal Commission, and against Mr. Macarthy, a Municipal servant, to compel them to rebuild an *otá* or verandah, which they were alleged to have illegally caused to be pulled down, in front of the plaintiff's house; or, in the event of such a decree not being passed, the plaintiff claimed Rs. 150 as damages.

The Munsif heard the case, and awarded Rs. 150 damages with costs against certain of the members, and against Mr. Macarthy, a municipal servant; and directed that the costs incurred by the president and other members of the municipality, against whom the decree was given, be borne by the plaintiff.

“ Against this decision, the president, Mr. Macdonald, one of the members, Mr. Greaves, and the municipal servant, Mr. Macarthy, have appealed to this court: urging as a preliminary point that the Munsif, under Sec. 43 of Reg. II. of 1827, exceeded his jurisdiction in trying the case.

“ My own opinion upon the point raised, and the reasons for this reference, will be gathered from the following extract from my finding on the 2nd issue in the case:—

“ I now come to the next important issue of all in this case, namely, whether the Munsif, in entertaining this suit, exceeded his jurisdiction. The question turns upon the

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point, whether the defendants are *public servants*, and whether the suit is brought for acts done by them in their *public capacity*, within the meaning of Sec. 43 of Reg. II. of 1827. (a)

“In considering this question it must be borne in mind that the suit is not against the municipality as a corporation or a company, but against certain members, and one of the servants of the municipality, personally. The recovery of damages was not sought by the plaintiff from the municipal funds; but from the defendants personally. The decree also passed by the Munsif is against certain of the defendants personally, and not against the municipality as a corporate body.

“Now, does Sec. 43 of Reg. II. of 1827 except municipal commissioners and their servants from the jurisdiction of the subordinate Native Judges?

“The Municipal Act having been passed in the year 1850, it is quite clear that the Legislative authorities could not have had municipal commissioners in contemplation when framing the Regulation of 1827. But, in framing that Regulation they thought proper to except public servants generally from the jurisdiction of the Native commissioners, with respect to acts done by them in their public capacity; and in order to ascertain, whether the defendants in this case can claim that exception, we have to decide whether they are public servants or not.

“Who is a public servant? The Munsif has recorded his own opinion that public servants are only those who are employed in Government Offices. But I cannot concur.

(a) Sec. 43:—“If whilst a suit is pending it shall appear that either of the parties \* \* \* is related to the Commissioner (b), or is his servant or dependant; that the Commissioner is personally interested in the suit; that the defendant is a public servant, and that the suit is brought for acts done by him in his public capacity, \* \* \* he shall stay further proceedings, and send up such suit to the Judge, or the Judge may require him to do so, and in either case the Judge may try the suit himself, or refer it to any competent authority for that purpose.”

(b) The Native Commissioners or Judges were divided into three classes by Reg. XVIII. of 1831, and their designations were altered, by Act XXIV. of 1836, to those of Principal Sadr Amin, Sadr Amin, and Munsif.—ED.

Interpreting the Regulation, it must, I think, be interpreted liberally. The words used must be read with their ordinary and full meaning. There is no reason to suppose that in framing the above Regulation, the framers intended to give immediate servants of Government any additional privilege over and above other public servants. In fact, the Munsif, in his interpretation of the law, has substituted the words '*Government servant*' for '*public servant*.' It is true that all Government servants are public servants; but all public servants need not necessarily be Government servants. A public servant is simply a servant of the public, and is to be distinguished from all other servants in this, that whatever he does in his capacity of public servant, he does, on account of the public, and not for the sake of, or in behalf of, a certain ascertainable master or masters. A private servant works for the interest of a certain person, or a certain partnership of persons; whereas a public servant performs his duties in the interest of everybody residing in or connected with the sphere of his labours. This is, as I understand it, the ordinary and full meaning attached to the words "*public servant*," and without doubt municipal commissioners and their servants (*employés*) come within the meaning of the term.

"There is a definition of the words '*public servants*' given in the Indian Penal Code, Sec. 21, which, of course, is only binding when we wish to ascertain the meaning of the term as used in that Code; but that definition is, nevertheless, useful, as showing that the words '*public servants*' are fairly applicable to a municipal commissioner, without in any way straining the meaning of the words, because that definition by no means includes any person whom one would not habitually call a public servant.

"The evidence clearly shows that the acts complained of were done by the defendants in their capacity of municipal commissioners. Mr. Macarthy is a servant of the municipality; and what he did was done in his capacity as servant. I have, therefore, no hesitation in saying that the acts done by the defendants for which the

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suit is brought, were done by them in what I consider to be their *public capacity*.

The only disputed point is whether the defendants, in their capacity of commissioners, and of a servant of the municipality, respectively, are public servants. For the above recorded reasons, I consider that they are, and that, therefore, under Sec. 43 of Reg. II. of 1827, the Munisif exceeded his jurisdiction in inquiring into and determining the suit.

"In the event of my decision upon this point being as it is, the vakils for the respondents applied that a statement of the case might be drawn up and submitted for the decision of the High Court, and drew my attention to a copy of a decision in a special appeal passed by the court on the 5th of April 1864, from which it is clear that the suit in that case, being against municipal commissioners, was tried, by the Principal Sadr Amín of Súrat; and that no objection was raised to his jurisdiction. If the point was not raised, it may well be that it escaped observation; but the fact that no exception was made, leaves some doubt in my mind. I understand also that there are other similar cases pending in the lower court, the proceedings in which must depend upon the issue in this case. I think, therefore, there is reason for acceding to the vakil's application.

"I may mention that several of the defendants in the original case were *ex-officio* members of the Commission, in accordance with Bombay Act IX. of 1862, Sec. 2.

The case was heard before COUCH, C.J., and NEWTON, J.

*Nánábhái Haridás*, for the plaintiff:—When Reg. II. of 1827 was passed, the terms "*Government servants*" and "*public servants*" meant the same thing. This appears from the Regulation itself, for the terms "*Government servants*," "*public officers*," and "*public servants*" are used in it without any distinction. Up to 1850, when the Municipal Act was passed, there were no other public servants but servants of Government. The Municipal Act does not say that persons

acting in pursuance of that Act shall be public servants; they cannot be public servants under Reg. II. of 1827. In the Penal Code a municipal commissioner is a public servant; but that is so far as that Code goes, and no further. The definition of a public servant in that Code is much wider than what the term meant before 1850. Under Reg. II. of 1827 no one would have contended that a member of a panchayat was a public servant. It is not correct to suppose, as the Assistant Judge seems to do, that he who serves the public is a public servant. Then the Nagarshet and Mahajan, who performed the duties of municipal commissioners before the Municipal Act XXVI. of 1850 was passed, would be public servants.

COUCH, C.J.:—When we look at the nature of the appointment of municipal commissioners—that they are appointed by Government, and can be removed by it—we think that they must be considered to be public servants.

The special appeal cited before the Judge is no authority, as the question was not raised in the case.

We shall, therefore, answer the reference by telling the Judge that we are of opinion that the defendants are public servants within the meaning of the Regulation.

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April 16.

*Special Appeal No. 243 of 1866.*

NA'RANBHA'I VRIJBHU'KANDA'S ..... *Appellants.*  
NA'ROSHANKAR CHANDROSHANKAR and an-  
other ..... *Respondents.*

*Examination of Witnesses in Court of First Instance—Transfer of Suits—Irregularity “not affecting the merits of the case”—Waiver—Wagering Contract—Bona fides—Burden of Proof—Error in Law—Special Appeal—Act VIII. of 1859, Secs. 6, 172, 183, and 350.*

A suit, instituted in the Court of the Principal Sadr Amín, was transferred, under Sec. 6 of Act VIII. of 1859, to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amín; and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif, upon evidence recorded by the Principal Sadr Amín; and that the *onus* of proving the *bona fides* of the transaction which was the subject-matter of the suit was thrown, by the District Judge, on the plaintiff, instead of on the defendant, who alleged the want of it :—

*Held* (1) That the Munsif's having used the evidence recorded by the Principal Sadr Amín, was only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case—the decree of the Munsif being in the plaintiff's favour—it was not a ground for reversing the decree on special appeal. (2) That the *onus* was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law; as the Judge did not hold that the defendant was entitled to succeed without giving any evidence, unless the plaintiff disproved the allegation of want of *bona fides*.

The meaning of Sec. 183, taken in connection [with Sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself in the court of first instance, and not upon a perusal of depositions, except those taken under Sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing; and care should be taken, in the transfer of suits and in the disposal generally of the business of the lower courts, to prevent the necessity of re-summoning witnesses.

THIS was a special appeal from the decision of C. G. Kemball, Acting Judge of the Súrat District, in Appeal Suit No. 215 of 1865, reversing the decree of the Munsif of Súrat.

The original suit was brought to recover Rs. 2,753-1-8, with interest, on a balance of account arising out of a contract for the purchase of twenty-five bundles of cotton thread by the defendant.

The Munsif decided in favour of the plaintiff, on the evidence before him, portion of which had been taken before the Principal Sadr Amín, from whose court the suit was transferred, under Sec. 6 of Act VIII. of 1859.

The Acting Judge reversed the Munsif's decree, on the ground that the contract between the parties was in the nature of a wagering contract, and not a *bonâ fide* transaction ; and also on the ground that the evidence adduced by the plaintiff in support of his case was not satisfactory.

The Special Appeal was argued before COUCH, C.J., NEWTON, TUCKER, WARDEN, and GIBBS, JJ.

*Shántáram Náráyan*, for the appellant, contended (among other things) that there was a failure of justice, inasmuch as the evidence was recorded by one Judge in the court of first instance, and weighed by another, contrary to the provisions of Secs. 173 and 183 of Act VIII. of 1859 ; that the lower appellate court would not have come to the conclusion it arrived at, had this irregularity not been glossed over ; that the lower court was wrong in casting the *onus* of the *bonâ fides* of the transaction on the plaintiff, instead of on the defendant, who had raised the defence.

*Nánábhái Haridás*, for the respondent, contended that the plaintiff had waived the irregularity of the evidence being used, by not requiring the witnesses to be again examined, and by producing other witnesses to be examined on his own behalf : he could have remedied the irregularity, by objecting to it in time before the court of first instance ; that the plaintiff was not injured by the irregularity, as the judgment of the Munsif was in his favour ; and that the lower appellate court's finding as to the *bonâ fides* of the transaction was on a question of fact, and could not be considered in special appeal.

*Cur. adv. vult.*

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1867. COUCH, C. J. :—In this suit, which was brought to recover NA'RANBHA'I Rs. 2,753-1-8, the balance of an account, together with interest, upon a contract to purchase twenty-five bundles of VEIJBHU'KAN- DA'S v. NA'ROSHANKAR CHANDRO- SHANKAR et al. thread from the plaintiff, evidence had been taken in the Court of the Principal Sadr Amín at Súrat; and the suit was transferred, under Sec. 6 of Act VIII. of 1859, to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff for the amount of his claim. Of eight witnesses who were examined by the Principal Sadr Amín, seven were for the plaintiff; and of six examined by the Munsif, three were for the plaintiff.

The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amín; and the District Court reversed the Munsif's decree with costs, but on the merits, and not on this ground.

The plaintiff has appealed to this court: stating, as one of the grounds, that the suit has been illegally decided by a different Judge, upon evidence recorded by the Principal Sadr Amín.

Now the evidence taken by the Principal Sadr Amín, even if taken in a former suit between the same parties, and not, as this was, in the same suit, would have been admissible as secondary evidence, if the witnesses had been incapable of being called; and the use of it by the Munsif was, in my opinion, only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be again examined, and proceeding with the suit, and producing other witnesses to be examined in support of his claim.

The plaintiff now asks this court to reverse not only the decree of the District Court, which is against him, but also the decree of the Munsif, which was in his favour, and was founded on the evidence which he now contends was inadmissible. I think he is not entitled to this.

Further, by Sec. 350 of Act VIII. of 1859, this court ought not to reverse the decree, unless the irregularity has affected the merits of the case. In courts where the pro-

ceedings are conducted strictly, the plaintiff, having allowed this evidence to be used by the Munsif without objection, would not be at liberty afterwards to object to its being used, or obtain a new trial on that ground, even if the original decree had been against him: Taylor on Evidence, Sec. 1681. And although this rule cannot be applied to such courts as the Munsif's, it is only just and equitable that, before effect is now given to the objection, it should appear that the plaintiff has been prejudiced.

I think this does not appear. In the Munsif's court the plaintiff cannot have been prejudiced, because the decree was in his favour; and the only mode in which he can have been prejudiced in the District Court, is by the Judge having attached less importance to the finding of the Munsif upon the facts, than he would have done if all the evidence had been taken by the Munsif himself. There is a passage in the judgment of the District Court which raised some doubt in my mind, in the course of the argument, and suggested the possibility that, if the Munsif had himself taken all the evidence, the Judge might not have felt himself justified in coming to an opposite conclusion to his upon it; but I now think this would not have made any difference in the conclusion the Judge came to, and that the plaintiff has not been prejudiced.

I think, therefore, that the special appellant is not entitled to succeed on this ground of appeal; but as the question raised is of considerable importance, as regards the practice of the lowest courts, it may be well to express an opinion upon it, independently of the facts in this case. It must be determined by the provisions of the Code of Civil Procedure, by which the practice of those courts is regulated; there being no rule of jurisprudence which requires that the evidence in the suit shall be taken by the Judge who pronounces the judgment, and the practice in many courts being, as is well known, to the contrary.

Now Sec. 172 of Act VIII. of 1859 directs that: "On the day appointed for the hearing of the suit, or on some other day to which the hearing may be adjourned, the evidence of

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the witnesses in attendance shall be taken orally in open court, in the presence and hearing, and under the personal direction and superintendence, of the Judge ;" and in cases in which an appeal lies to a higher tribunal, it prescribes a mode of taking the evidence, intended to give as much assistance as can be given to a court which has to decide upon written depositions. In cases not appealable this mode need not be followed. Then Sec. 183 says : " When the exhibits have been perused, the witnesses examined, and the parties heard in person or by their respective pleaders, the Court shall pronounce its judgment ;" and I think the meaning of this, looking at it in connection with Sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself, and not upon a perusal of depositions, except those taken under Sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing.

Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower courts, to prevent the necessity of re-summoning witnesses; but where a deposition taken by another Judge is read, instead of the witness being examined, I think it is only an irregularity, which may be waived by the parties, and which would not be a ground for reversing the decree on special appeal; unless it appeared that the appellant had been prejudiced by it.

The other ground of appeal taken in this case, that the *onus* was thrown upon the plaintiff of showing that the contract was not a time-bargain, is not, I think, sustainable. The *onus* was not thrown upon the plaintiff in its proper sense, and so as to be an error in law. One of the defendants having alleged that the contract was a wagering one, both parties gave evidence. The Judge did not hold that the defendant was entitled to succeed, without giving any evidence, unless the plaintiff disproved the allegation; but that upon the evidence given, he was not satisfied that the transaction

was a *bonâ fide* one. If the plaintiff, having attempted to show that he was capable of performing the contract,—an issue which might be raised, and the proof of which would be upon him,—failed in showing it, as the Judge appears to have thought he did, very little evidence on the part of the defendant would suffice to raise the presumption that the contract was a wagering one, and change the burden of proof. It was for the Judge to estimate in the particular case the amount of evidence required, and the exact force of the presumption that the contract was a *bonâ fide* one ; and if he has made a mistake in his estimate, it is not a ground for a special appeal.

I am, therefore, of opinion that the decree of the District Court should be affirmed.

NEWTON, WARDEN, and GIBBS, JJ., concurred.

TUCKER, J.:—I concur generally in the decision which has been arrived at. It appears to me that one of the main underlying principles of the Code of Civil Procedure is that, at an original trial, the Judge who decides the cause shall have personally heard the evidence of the witnesses, on whose testimony his judgment is to be based, except in certain specified instances ; and I cannot find that it is anywhere contemplated that a Judge of a court of first instance should pronounce judgment on evidence taken before a predecessor in the same court, or before a Judge of any co-ordinate tribunal, from which a part-heard suit may have been removed.

I consider, therefore, that when a Judge of a court of original jurisdiction, whose proceedings are regulated by the Code of Civil Procedure, dies, or is removed to another appointment, before the conclusion of a trial, or when a partially tried suit is removed from one court to another, the evidence of the witnesses, who have been examined by the court which commenced the inquiry, must be taken *de novo*, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or Court on whom it will devolve to pass judgment.

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In the present case I hold that the plaintiff must be considered to have assented to the Munsif's procedure, as he took no exception at the time, and acquiesced in the decree which was made in his favour, on the evidence to the admission of which he now objects. Under these circumstances, I do not think that it is competent to him to make this objection at the present time; even though it may be manifest that he has, to a certain extent, been prejudiced by this procedure.

That he has been so prejudiced is, I think, evident from the District Judge's remark: "I note the fact" (*i.e.*, that the Munsif had decided on evidence recorded by another Judge) "here as a reason for considering that I am in as good a position to judge of the merits of the recorded depositions as the Munsif who decided this case," which shows that the District Judge considered that, under the circumstances, the Munsif's opinion on the evidence was not entitled to the same degree of weight which it would have carried with it, if the Munsif had been personally present when the testimony of the witnesses was given.

I do not, however, consider that the plaintiff is entitled to have a new trial on this account. Looking upon him as having assented to the Munsif's proceedings, he must accept the consequence of his act, even though he may be shown to have assented to a course of procedure which eventually operated unfavourably to his interest.

*Decree affirmed.*

Special Appeal No. 112 of 1867.

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BHAGVATSANGJI JA'LAMSANGI.....Appellant.  
PARTA'BSANGJI AJJA'BHA'I and another ...Respondents.

Special Appeal No. 211 of 1867.

GANPATRA'M LAKHMI'RA'M and others .....Appellants.  
JAICHAND TALAKCHAND .....Respondent.

*District Judge—Judgment—Reasons for Decision—Decree—Irregularity—Merits—Special Appeal—Act VIII. of 1859, Secs. 350, 359, and 372—Act XXXIII. of 1854, Sec. 4.*

*Held*, that a District Judge not writing a judgment containing the reasons for his decision, until after the decree in appeal was passed, did not affect the decision of the case on the merits, and was not a ground of special appeal.

IN S. A. No. 112 of 1867, the special respondents, Partáb-sangji Ajjábhái and Jayasangji Ajjábhái, instituted the Original Suit (No. 122 of 1861) in the Court of the Munsif of Gogo, to recover from the defendant, Bhagvatsangji Jálamsangji, two shares of the land in the village of Kankhot, and two shares of the income of the said village for the Samvat years 1914, 1915, and 1916 (A.D. 1858, 1859, and 1860).

The defendant appeared, and contended that the plaintiffs had no right, title, or interest in the said village, or in the income thereof, as he, being the only son of the plaintiffs' eldest brother, was, by the custom of the Látia Garásías, entitled to the whole of the estate, the younger brothers being merely entitled to *jivái*, or an allowance for their maintenance.

The Munsif, A'zam Jamyatrám Himatrám, by his decree passed on the 1st of December 1862, ordered that the plaintiff should recover possession from the defendant of two shares, being 57 out of 100 *doctrás* of the said village, and also certain sums of money in respect of the income thereof, and for mesne profits together with costs.

The defendant then appealed to C. H. Cameron, Judge of

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the District of Ahmedábád, in Appeal Suit No. 383 of 1862, on the ground (among others) that the decision of the Munsif was contrary to the custom of the country and of the caste. To that appeal the plaintiffs appeared, and the District Judge, on the 5th of December 1863, reversed the decree of the Munsif, and threw out the plaintiffs' claim with costs, on the ground (which was not taken by the defendant) that a suit for a tálukdári village was not cognisable by the court; as "the land in tálukdári villages belongs to Government, as shown by the Bombay Act No. VI. of 1862."

The plaintiffs then preferred a special appeal (No. 373 of 1864) to the High Court, which came on for hearing on the 25th of July 1864, before ARNOULD, Acting C.J., NEWTON and JANA'R'DAN VA'SUDEVJI, JJ.

*Dhirajlál Mathurádás* for the appellants.

*Nánábhái Haridás* for the respondent.

PER CURIAM:—The Court, holding that the District Judge has erred in considering the case removed from his cognisance by the Tálukdári Act, reverse his decree, and remand the case to him for a judgment on the merits.

*Case remanded.*

The aforesaid Appeal Suit, No: 383 of 1862, was, accordingly, re-heard in the District Court of Ahmedábád, on the 17th of October 1864, by the then Judge, E. P. Down, who affirmed the aforesaid decree of the Munsif of Gogo, on the ground solely that Colonel Lang, the Political Agent in the province of Káthevád, had decided that four other villages in that province should be divided between the plaintiffs and the defendant, in the same proportion as the said Munsif of Gogo had, by his decree, ordered the said village of Kankhot to be divided.

The defendant then preferred a special appeal (No. 17 of 1865) to the High Court, which came on for hearing on the 26th of July 1865, before FORBES and NEWTON, JJ.

*Reid and Nánábhái Haridás* for the appellant.

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*Howard and Dhirajlál Mathuradás* for the respondent.

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PER CURIAM:—The Court, holding that the District Judge was not justified in deciding the case solely upon the opinion expressed by Colonel Lang, without exercising his own judgment upon the evidence recorded in the case, reverse his decision, and again remand the case to the District Court for a decision on the merits. And the Judge is directed to decide upon the evidence recorded, and upon any other evidence which he may see fit to receive, whether the plaintiff is entitled to any, and what, share in the lands claimed, and to pass a new decree.

*Case remanded.*

The aforesaid Appeal Suit, No. 383 of 1862, accordingly, came on for hearing a third time, in the District Court of Ahmedábád, before the then Judge, A. R. Grant, by whom a decree was passed, on the 7th of January 1867, confirming the aforesaid decree of the Munsif of Gogo, with all costs on the defendant.

The defendant then preferred another special appeal (No. 112 of 1867) to the High Court, upon the following grounds of objection to the decree appealed against:—That it was contrary to law in that: (1) It was pronounced at a time when the judgment was not written out by the Judge, and was, therefore, not capable of being recorded; (2) The judgment was written by the Judge nearly a year after the case was heard, and at a time when he was suspended from his office of Judge, and when the office was held by another individual; (3) The Judge had held the custom of Látia Garásías to differ, according as the estates in dispute were large or small, and that in the absence of evidence of any difference of custom; (4) The Judge had decided contrary to the custom governing large estates, which he held undeniably proved.

The case was heard on the 11th of July, 1867, before COUCH, C.J., NEWTON and WARDEN, JJ,

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*Nánábhái Harídás*, for the appellant:—Mr. Grant did not hold the office of District Judge when he wrote the judgment in this case, and the judgment was not written out when he stated in court what his decision was. There was no evidence to warrant the finding of the Judge that the custom of the Látia Garásíás differed, according as the estates in dispute were large or small.

No one appeared for the respondent. The decree of the District Court in Gujaráti was produced, dated the 27th of January 1866, and signed by the Judge and indorsed by the Sheristedár, as recorded in the case on that day.

*Cur. adv. vult.*

Couch, C.J.:—We are of opinion that the not writing a judgment, containing the reasons for the decision, before the decree was passed, has not affected the decision of this case upon the merits, and is not a ground of special appeal.

Act XXXIII. of 1854, Sec. 4, expressly provided that no appeal should lie on the ground of non-compliance with similar provisions to those of Sec. 359 of Act VIII. of 1859.

The Code of Civil Procedure has not expressly so provided; but it may have been considered by the Legislature that the provisions of Secs. 350 and 372 would be quite sufficient to show that the point under consideration was not a ground of appeal.

In this view of the Law, even if we entertained any doubt, which we do not, we are supported by a decision of the Calcutta High Court, where Sir Barnes Peacock, C. J., and Levinge, J., held that the mere circumstance that the judgment was delivered out of court was not a ground of special appeal.

As to the other point taken, the finding of the Judge is one of fact upon the evidence, and there is no error in law in his decision, which we affirm with costs.

*Decree affirmed.*

IN S. A. No. 211 of 1867, the original suit was brought by the special respondent to compel the defendants (special appellants) to close certain windows overlooking an inclosure attached to the plaintiff's house, and thereby encroaching on his privacy.

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GANPATRA'M  
LAKHMI'RA'M

JAICHAND  
TALAKCHAND  
*et al.*

The Principal Sadr Amín of Ahmedábád threw out the plaintiff's claim; but the District Judge, A. R. Grant, in Appeal Suit No. 240 of 1864, on the 27th of January 1866, reversed his decision, and passed a decree for the plaintiff, ordering the windows to be closed.

Against this decree a special appeal was preferred, which came on for hearing on the 11th of July 1867, before Couch, C.J., NEWTON and WARDEN, JJ.

*Dhirajlál Mathurádás*, for the appellant, contended that the judgment in this case was contrary to law, as it was written by Mr. Grant after he had ceased to hold the office of Judge; and was not pronounced by him in open court, with the reasons for the decision, as directed by Sec. 359 of Act VIII. of 1859.

*Shántárám Náráyan*, for the respondent, contended that that point could not be raised, as there was nothing to show that the Judge had ceased to hold office on the day the judgment was written. After the hearing of the appeal on the 27th of January 1866, the decree was signed by the Judge, and indorsed by the Sheristedár, as recorded in the suit on that day. There is also, on the petition of appeal, a note by Mr. Grant of his decision.

*Cur. adv. vult.*

COUCH, C.J. :—We are of opinion that the irregularity objected to has not affected the merits of this case; and that there is no ground of special appeal.

*Decree affirmed.*

NOTE.—In Special Appeal No. 213 of 1867, decided on the 3rd of July, it was held by NEWTON and WARDEN, JJ., that the not giving reasons, when the decree of the lower court is reversed, is not a ground of special appeal. And see 1 Cale. W. Rep., Civ. R., 244; 2 Cale. W. Rep., Civ. R., 77; 5 Cale. W. Rep., Civ. R., 178.—ED.

1867.  
Sept. 16.

## Special Appeal No. 273 of 1866.

DULLABH JOGI and others ..... *Appellants.*NA'RA'YAN LAKHU' and others ..... *Respondents.*

*1137*  
*Act VIII. of 1859, Secs. 2, 31, 36—Cause of Action “ Heard and Determined”—Valuation of Claim—Rejection of Suit after Registration of Plaintiff—Fresh Plaintiff—Reg II. of 1827, Sec. xxi.*

A suit was brought in the Court of a Munsif, who gave judgment for the plaintiffs, but his decree was reversed by the District Judge, on the ground that the claim was improperly valued. A second suit, on the same cause of action, was then brought in the Court of the Munsif, who again decided for the plaintiffs; but his decree was reversed by the District Judge, on the ground that the suit was prohibited by Reg. II. of 1827, Sec. xxi. The High Court, on special appeal, reversed that decision, and remanded the suit; and the District Judge then threw out the claim, under Sec. 2 of Act VIII. of 1859, on the ground that the cause of action had already been heard and determined. In a second special appeal against this decision:—

*Held* that the plaintiffs were not precluded from presenting a fresh plaint in respect of the same cause of action; and that the case came within the spirit of Sec. 36 of Act VIII. of 1859; as, there being no express power given by the Code to reject a plaint after it had been registered by reason of the claim being improperly valued, the doing so ought to have only the same effect as if the plaint had been originally rejected.

THE plaintiffs (special appellants) brought a suit, in the Court of the Munsif at Súrat, to compel the defendants (special respondents), to allow them to use certain cooking utensils for caste purposes.

The Munsif gave judgment for the plaintiffs; but the Judge in appeal reversed his decree, and rejected the suit, on the ground that the claim was improperly valued.

The plaintiffs then presented a fresh plaint, in respect of the same cause of action, which was admitted and registered by the Munsif, who again decided in favour of the plaintiffs.

On appeal, the District Judge, C. H. Cameron, again reversed the Munsif's decree, on the ground that the suit was barred by Reg. II. of 1827, Sec. xxi. (a)

(a) Sec. xxi. :—“ The jurisdiction of the Civil Court shall extend to the cognisance of all original suits and complaints between natives and others \* \* \* respecting the right to moveable or immoveable property, rents, Government revenues, debts, contracts, marriage, succession, damages for injuries, and generally of all suits and complaints of a civil nature, it being understood that no interference on the part of the Court in caste questions is hereby warranted, beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the caste and character of the plaintiff, arising from some illegal act or unjustifiable conduct of the other party.”—ED.

The plaintiffs then presented a special appeal (No. 226 of 1865) to the High Court, which was heard, on the 5th of December 1865, before WARDEN and JANA'RDAN VA'SUDEVJI, JJ.

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LĀKHU'.

PER CURIAM :—The Court holds that Reg. II. of 1827, Sec. xxi., Cl. 1, is not applicable to a claim of this nature, namely, the right to be allowed to use certain cooking utensils. The Court, therefore, reverses the decree of the lower court, and remands the case for re-trial on the merits.

*Case remanded.*

The appeal (No. 149 of 1864) then came on for re-hearing, in the District Court, before C. G. Kemball, Acting Judge of Sūrat, who recorded the following decision :—

“ The issues for decision are :—(1) Whether this action is within the cognisance of the civil courts, as regards Sec. 2 of Act VIII. of 1859 ; (2) If it is, whether the claim urged by the plaintiffs was sufficiently established on the evidence to warrant the decree passed by the Munsif.

“ On the first point, I am of opinion that this suit cannot be maintained, the same cause of action having already been heard and determined in a suit decided on the 8th of July 1863. It is true that the said suit was decided on a preliminary point respecting the amount entered in the plaint, but that does not, in my opinion, affect the question at issue, whether the present suit is within the cognisance of the civil courts.

“ With regard to the second point, it appears unnecessary to express any opinion beyond remarking that, after reading over the evidence, I demur to the Munsif's finding.

“ On the first point the decision of the lower court is reversed, with costs on the respondents.”

The plaintiffs then preferred the present special appeal, which came on for hearing this day before COUCH, C.J., and NEWTON, J.

Shántárám Nárāyāṇ, for the appellants :—The first suit having been rejected by the District Court in appeal, on the ground that the claim was improperly valued, the cause of

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action could not be said to "have been heard and determined," within the meaning of Sec. 2 of Act VIII. of 1859. (b)

*Nánábhái Harídás*, for the respondents :—The plaintiff is only entitled to present a fresh plaint in respect of the same cause of action, under Sec. 36 of Act VIII. of 1859, when the former plaint has been rejected "on any of the grounds mentioned in Secs. 29 and 31" of the Act. But in this case the first plaint had been admitted and registered, and the Munsif heard the suit, pronounced his judgment, and made a decree, which was reversed in appeal by the District Judge. The cause of action in the first suit was, therefore, "heard and determined;" and a second suit between the same parties on the same cause of action was prohibited by Sec. 2 of Act VIII. of 1859.

COUCH, C.J. :—This case comes within the spirit of Sec. 36 of Act VIII. of 1859.

There is no express power given by the Code of Civil Procedure to reject a plaint, after it has been registered, on the ground that the claim had been improperly valued. When a suit, therefore, is rejected at any subsequent stage of the proceedings on that account, the rejection ought to have only the same effect, as if the plaint had been originally rejected, in accordance with Sec. 31 of the Act, when it was presented for registration.

Independently of Sec. 36 of the Act, we should have held upon principle that in such a case as this, the action was not barred. The former suit was not heard and determined, for it failed by reason only of an informality; and it would be contrary to all principles of justice that the parties should be held to be conclusively barred thereby.

We, therefore, reverse the decree of the District Judge, and remand the case once more; and in doing so we express a hope that it may now at last be decided upon the merits.

The costs to follow the final decision.

*Decree reversed and suit remanded.*

(b) Sec. 2 :—“The Civil Courts shall not take cognisance of any suit brought on a cause of action, which shall have been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they claim.”—ED.

*Special Appeal No. 384 of 1866.*

1866.  
Nov. 28

MA'DHAVRA'V RA'GHAVENDRA.....*Appellant.*  
BA'LKRISHNA RA'GHAVENDRA *et al.* .....*Respondents.*

*Usage—Family Custom—Hindú Law.*

Evidence of the acts of a single family repugnant or antagonistic to the general law will not establish a valid custom or usage enforceable in a Court of Justice.

*Tara Chand v. Reeb Ram* (3 Mad. H. C. Rep. 50) followed."

THIS was a Special Appeal against the decision of W. Sandwith, Joint Judge of the District of Dhárwár, in Appeal Suit No. 476 of 1865, confirming the decision of the Munsif of Chikodí.

The plaintiff, Mádhavráv, brought this suit to obtain possession of a portion of an ancestral house in the possession of the defendants, alleging that by the custom of their family he as the eldest brother was entitled to the whole of it.

The defendants denied the family custom, and asserted that the case was governed by the general principles of Hindú law.

The Joint Judge considered that the Hindú law should take precedence of the custom of the country, according to Sec. 26 of Reg. IV. of 1827, and under this view confirmed the Munsif's decree.

PER CURIAM (TUCKER and GIBBS, JJ.) :—The Court are of opinion that the Joint Judge has ruled incorrectly in declaring that under Reg. IV. of 1827, Sec. 26, the written Hindú law should have the effect of British statute law, and take precedence of the usage of the country; but in the present case no usage of the country has been asserted.

The plea urged by the plaintiff was in reality that there was a *special family* custom, which is admittedly opposed both to Hindú law and the ordinary custom among persons bound by that law, of which he sought to take advantage. We concur in the opinion expressed on the point by the High Court of Madras in *Tara Chand v. Reeb Ram* (a),

(a) 3 Mad. H. C. Rep. 50.

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and consider that no evidence of the acts of a single family repugnant or antagonistic to the general law, will establish a valid custom or usage which can be enforced by a Court of Justice, and we hold consequently that the court of first instance decided correctly in refusing to inquire into the existence of such special family custom. We, therefore, affirm the decree of the lower courts: costs on the special appellants.

*Decrees affirmed.*

1867.  
March 21.

*Special Appeal No. 46 of 1867.*

DHONDU' MATHURA'DA'S NA'IK.....*Appellant.*  
RA'MJI valad HANMANTA' KA'KDA'.....*Respondent.*

*Sale—Sheriff's Sale—Immoveable Property—Warranty—Caveat Emptor.*

In a sale of immoveable property made by a Civil Court in execution of a decree, there is no implied warranty by the execution creditor of the title of the judgment debtor—the maxim "*caveat emptor*" applying.

THIS was a Special Appeal from the decision of A. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 359 of 1866, confirming the decree of the Munsif of Sinnar.

The case was argued before TUCKER and GIBBS, JJ.

Shántarám Náráyan and Pándurang Balibhadra for the special appellant.

Ganesh Hari Patvardhan for the special respondent.

The facts of the case, so far as material, appear from the following judgments, delivered this day:—

GIBBS, J.:—This is a suit brought by Rámji against Dhondú to recover damages which, he alleged, had accrued by Dhondú having attached, and the Court having sold, certain land as the property of Dhondú's judgment debtor, Ráma, but which was subsequently decided by decree of the Court, in a suit, "*Rámji v. Ráma*," not to belong to that person.

The Munsif held that it was incumbent on Dhondú to prove that the land belonged to his judgment debtor, and

found for Rámji accordingly; but the District Judge reversed this decree, and returned the case for re-trial, whereat the Munsif again found in favour of Rámji, and this latter decree the District Judge confirmed on appeal.

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v.  
RA'MJI  
HANMANTA'.

A special appeal was admitted against this judgment of the District Judge, and, on the case coming on for hearing, the pleader for the special respondent took the objection that it was a Small Cause Court case, and therefore that no special appeal would lie.

We held this objection to be untenable, as on perusing the proceedings in the lower courts, we found that they had decided a question of title to immoveable property, and that in consequence, under the ruling of *W. D. Díkshít v. B. V. Díkshít (a)*, a special appeal would lie.

The pleader for the special respondent objected to the decree as being contrary to law, because there was no warranty, either expressed or implied, and that to such sales the maxim *caveat emptor* applied. It was attempted to be shown on the other side that the maxim did not apply, and that the purchaser at a Court's sale purchased, at all events, under an implied warranty.

The case was adjourned for examination of precedents, but none have been cited save *Sambhulál v. The Collector of Súrat (b)*, in which the application of the maxim *caveat emptor* is incidentally mentioned; but upon examining the report, it appears that the Judicial Committee of the Privy Council disposed of the case on an entirely different point, and abstained from expressing any opinion as to the applicability of the maxim. It therefore becomes necessary to look elsewhere for precedents to guide the Court in its decision.

Among the leading cases in England are *Morley v. Attleborough (c)* and *Chapman v. Spiller (d)*. The latter in particular meets the question of Sheriffs' sales and the title acquired therat.

A review of these cases shows that under the Roman Law (Domat, Vol. I., Book 1, Tit. 28: 2 Strahan's Translation,

(a) 2 Bom. H. C. Rep. 4.

(b) 8 Moor. P. C. Rep. 22. (c) 3 Ex. 500. (d) 14 Q. B. 621.

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 HANMANTA. Vol. I., p. 60) "the seller ought to warrant, that is, secure, the buyer in the peaceful possession of the thing sold;" but against this there is a note which corresponds with Coke Littleton 102 a: "although, by the civil law, every man is bound to warrant the thing he selleth or conveyeth, albeit there is no express warranty; but the Common Law bindeth him not, unless there be a warranty, either in deed or in law, for *caveat emptor?*" and this is the rule of law of English Courts, "except fraud be proved against the vendor," as is laid down by *Littledale*, J., in *Eardly v. Garrett* (e): "the scienter or fraud is the gist of the action where there is no warranty." In *Morley v. Attenborough* it was held that at a public auction of unredeemed pledges, the purchaser could not recover against the vendor when the chattel sold subsequently turned out to belong to a third party who recovered it from the purchaser, as in such a case no warranty was given.

But the case of *Chapman v. Spiller* more particularly applies to the special appeal before us, as in that the question was whether at a Sheriff's sale in England any warranty was given or implied; and the Judges of the Queen's Bench held, chiefly on the authority of *Morley v. Attenborough*, that there was none. And that such had been the rule for many years is shown by the following observation of *Parke*, B., quoted in that case (from 18 L. J., N. S. Ex., 150): "I recollect contending before Sir James Mansfield, that in a sale by the Sheriff a warranty of title was implied, and my position was received with much contempt and astonishment, and I was asked to produce an authority for it."

This seems decisive. If fraud had been shown, it would, as above noticed, have altered the case; but in the present suit fraud is not asserted, much less established, although the District Judge, by a method of reasoning peculiar to himself, and which the Court cannot follow, holds that because, in a suit *subsequently brought*, the land in dispute was held not to belong to Ráma, "therefore the attaching credi-

tor, Dhondú, cheated within the terms of the Penal Code ;" "as," the District Judge adds, "he by attaching and obtaining the sale intentionally induced some person, *i.e.*, Ráma, the original plaintiff, to do that which he would not have done if he were not so deceived—purchase at auction and pay for the field which had not been delivered to him, and for which Rs. 151 were made over to the judgment creditor, Dhondú, who should therefore be held liable for the pecuniary injury which plaintiff suffered."

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An examination of the papers shows that, so far from fraud being alleged on the first trial in appeal, the District Judge found the land belonged to the family of Ráma, the person in whose name it was attached, and further held that there was no evidence of separation between Ráma's father and uncle, showing at all events a *prima facie* title therein.

There is one matter, however, which needs notice. It may be said that Sheriffs' sales in England never include immoveable property, only chattels ; and that therefore a different rule should be applied to Courts' sales in this country at which immoveable property is sold ; but I see no good reason for this. The Code of Civil Procedure contains clauses by which every person may defend his right to immoveable property improperly attached, while what is sold is merely "the right, title, and interest" of the judgment debtor, and that without any warranty : so that the purchaser is left to his own resources, and, with the registration records at hand, he cannot be permitted to sit still and then plead that he has taken nothing by his bargain, when the right, title, and interest of the judgment debtor subsequently prove to be nothing at all.

Although no precedents have been produced, I cannot help being of opinion that the doctrine of the English courts, as laid down in *Chapman v. Spiller*, must be the practice of the courts here, as otherwise cases would certainly have arisen in which purchasers would have sought to recover against the vendors, as in the present case. We have heard of none, although, both on the Original side of this court and also in the Mofussil, such sales are of frequent occurrence.

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RA'MJI  
HANMANTA'.

I am of opinion that we must reverse the decrees of the Munsif and District Judge, and throw out Rámji's claim with all costs.

TUCKER, J.:—I concur in the conclusion at which my brother Gibbs has arrived, and consider that in sales of immoveable property made by a civil court in execution of a decree there is no implied warranty, by the execution creditor who has caused the sale, of the title of the judgment debtor. The proclamation declares that the sale extends only to the right, title, and interest of the judgment debtor in the property put up at auction; and a purchaser is bound to satisfy himself of the character and extent of this interest before he bids; and in case it should turn out that the judgment debtor has no interest whatever in the land or other real estate put up for sale, the purchaser has no remedy against the execution creditor, unless he can establish fraud or wilful misrepresentation on the part of that person.

It has been held in S. A. No. 417 of 1861, and Cases 2 and 3 of 1866, that a person whose property has been wrongfully sold in execution of a decree passed against some other person, can recover damages against the execution creditor for any loss which he may have suffered in consequence of the act of the latter in attaching and selling property which did not belong to his judgment debtor: and I think there can be no question of the soundness of these decisions. But the positions of the purchaser and of the person whose property has been wrongfully sold are different. In the latter case the injury is entirely the result of a wrongful act by another person, while in the former it is mainly attributable to a want of care and caution on the part of the injured individual himself. So that a person may be justly entitled to compensation in the one instance when he would not be in the other. The decrees of the District Judge and Munsif must be reversed, and the plaintiff's claim rejected, who must bear all the costs in all courts.

*Decrees reversed.*

*Civil Petition.**Ex parte BHIKAJI VITHAL A'MBEKAR.*1867.  
Dec. 2.

**Surety—Execution—Appeal—Act XXIII. of 1861, Sec. 11—Civ. Proc. Code, Sec. 204.**

By virtue of Sec. 11 of Act XXIII. of 1861 and the provisions of Sec. 204 of the Code of Civil Procedure, an appeal lies from an order passed in a matter between a judgment creditor and sureties on behalf of a judgment debtor for the performance of the decree.

**B**HIKAJI VITHAL A'MBEKAR sued one Trimbakráv Bhikáji, and obtained an order for the attachment of his property before judgment.

The property was accordingly attached, but, in consequence of Raghunáth Dashrathshet and Shekh Hárú valad Kádar becoming sureties for the fulfilment of any decree that might be passed up to a thousand rupees, it was released from attachment.

Bhikáji having obtained a decree on the 30th of July 1864 for Rs. 671, applied for execution of the same against the aforesaid sureties in April 1866, and attached their respective properties.

The Sadr Amín of Ratnágirí, Ráv Sáheb Dáji Govind Gupte, upon the application of Raghunáth alone, ordered the attachment on the properties of both the sureties to be removed.

An appeal having been made by the petitioner to the Acting Senior Assistant Judge of the Konkan at Ratnágirí, J. R. Naylor, he, without going into the merits, laid down a preliminary issue, viz., whether an appeal would lie in the case; and decided, on the 22nd of May 1867, that it would not, as in his opinion sureties could not be considered as parties to the suit. Against his order the present petition was presented, and on this day came on for hearing.

*Bhairavanáth Mangesh*, for the petitioner, argued that the decision of the court below was contrary to the provisions of Sec. 204 of Act VIII. of 1859, and Sec. 11 of Act XXIII. of 1861. He submitted that an appeal would lie.

PER CURIAM (COUCH, C.J., NEWTON and WARDEN, JJ.):—  
Mr. Naylor is to be informed that the court has already held,

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in the case of the transfer of a decree, that by the provisions of Sec. 208 of the Code of Civil Procedure, an appeal will lie, under Sec. 11 of Act XXIII. of 1861, on a question between the assignee of the decree and the judgment debtor. Under a similar provision contained in Sec. 204, the Court considers that an appeal lies in a matter between the judgment creditor and the surety of the judgment debtor. The order of the Acting Senior Assistant Judge is, therefore, reversed. He is directed to hear the appeal preferred to him.

*Acting Senior Assistant Judge's order reversed.*

March 28.

*Civil Petition.*

CHA'NGO valad DUDHA' MAHA'JAN ..... Petitioner.

KA'LURA'M NA'RÁYANDÁS ..... Opponent.

*Adjustment of Decree out of Court—Presumption—Civil Proc. Code, Sec. 206—Act XXIII. of 1861, Sec. 11.*

K., an execution creditor of C., applied to the Court by which the decree was passed, and caused C. to be imprisoned under it. C. then entered into a compromise upon certain terms with K. for the adjustment of the decree, and K. thereupon, *but without certifying the terms of such adjustment to the Court*, petitioned for the release of C., who was accordingly released.

Subsequently K. again applied to the Court to compel satisfaction of the whole amount of the decree against C.

This application was opposed by C., on the ground that an adjustment of the decree had taken place between him and K. The Judge, however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court, under Sec. 206 of the Civil Proc. Code.

*Held*, on appeal, that the Judge was in error ; that it was the duty of K., on applying for the release of C., to certify the adjustment to the Court ; that it would be unjust to allow him to take advantage of his own omission to do so, and that, not having done so, the presumption against him was that the decree had been satisfied in full, but that, under the circumstances, it would be the most equitable course to direct the Judge to inquire into the terms of the adjustment.

Case remanded for that purpose.

CHA'NGO presented a petition (a) to the High Court, in which he stated that Kálurám Náráyandás, by his agent, Govind Rámchandra Garúd, obtained a decree against

(a) See *Yeshvantráv Amritráv Jamín v. Ismáil Ali Khún*, 2 Bom. II. C. Rep. 99.

him for Rs. 6,250, and caused him to be imprisoned in the civil gaol in execution thereof; that thereupon he (the petitioner) requested one Sambhaji Ránoji Náik to undertake to pay Rs. 8,000 to the plaintiff, who, in consideration of this promise, allowed the petitioner to be discharged from the gaol; that subsequently the petitioner caused one Shivrám Ratanchand to pay Rs. 5,000 to the aforesaid Sambhaji Ránoji Náik, and also passed a bond for Rs. 3,000, in consideration of his having undertaken to pay Rs. 8,000 to the plaintiff; that notwithstanding this compromise, Krishpáji, another agent of the plaintiff, presented a petition to the Civil Court at Dhuliá, for the execution of the aforesaid decree and for the recovery of the whole amount; that, in opposing that application, the petitioner presented a petition embodying the allegations stated above, which was rejected, the following order having been made by the Honourable G. A. Hobart, Judge at Dhuliá:—

“ You do not state in the petition that the said adjustment was made through the Court, or that it was certified to the Court, nor do you show that such was the case. On considering Sec. 206 of Act VIII. of 1859, and Sec. 11 of Act XXIII. of 1861, there does not appear to me to be any ground for upholding the argument of the defendant. Your petition of objection is therefore rejected, and an order is issued for enforcing the plaintiff’s application for execution of the decree.”

Chángo’s petition against this order came on for hearing this day, before COUCH, C.J., and WARDEN, J.

“ *Dhirajlál Mathurádás*, for the petitioner:—Sec. 11 of Act XXIII. of 1861 provides that “ all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the court executing the decree, and not by a separate suit.” Under this provision the District Judge ought to have inquired as to the payment made by the petitioner. It is quite inequitable to call upon the petitioner

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to pay twice over; and it would be but justice to him to allow his allegations to be inquired into, as the petition presented by the opponent, praying for the discharge of the petitioner from arrest, shows clearly that the decree was adjusted. In a case similar in every respect to the one now before the Court, it was decided, in March 1863, that an inquiry ought to have been made, and it was accordingly remitted to the District Judge at Puná for proof and decision as to the allegation of the petitioner.

*Ganpatrāv Bhāskar*, for the opponent, argued that the words of Sec. 206 were imperative; and the District Court could not recognise any adjustment made out of court; and that it was so held in several cases reported in the Calcutta Weekly Reporter, (b); and that there had been no adjustment.

*CJ*  
 COUCH, C.J. :—Sec. 206 of Act VIII. of 1859 provides that “all moneys payable under a decree shall be paid into the Court, whose duty it is to execute the decree, unless such Court, or the Court which passed the decree, shall otherwise direct. No adjustment of a decree, in part or in whole, shall be recognised by the Court, unless such adjustment be made through the Court, or be certified to the Court, by the person in whose favour the decree has been made, or to whom it has been transferred;” and this, being unrepealed, still remains as law, notwithstanding the provisions of Act XXIII. of 1861, Sec. 11. Both these sections must be read together, and viewed as reconcilable with one another; and it has been so held by the Calcutta High Court in several cases. In addition to the cases cited I may mention a recent one, *Bhya Bhoopnāth Sahee v. Kunwan and others* (c), where Mr. Justico Macpherson held that “Sec. 11 of Act XXIII. of 1861 must be read along with Sec. 206 of Act VIII. of 1859, which expressly enacts that no adjustment of a decree, in part or in whole, shall be recognised by the Court, unless such adjustment be made through the Court, or be notified to the Court by the person in whose favour the decree has been

(b) 4 Calc. W. R., Mis. R. 11, 21; 2 Calc. W. R., Mis. App. 43.

(c) 7 Calc. W. R., Civ. R. 134.

made, or to whom it has been transferred. Here the adjustment now pleaded was not made through the Court, or notified, in the manner provided: therefore, it cannot be recognised by the Court (*id.*). The lower court says of Sec. 206 of Act VIII. of 1859, that, 'owing to the extreme ignorance of the bulk of the people of the district, this law has never been rigidly enforced, and it has been the custom of our courts to entertain objections of this nature, and to recognise payments not made through or notified to the court in the prescribed manner.' We have only to remark that the provisions of the Code of Civil Procedure are imperative on the point, and that any Court which, from motives of expediency, advisedly adopts and recognises a procedure which is forbidden by the Code, is guilty of a serious breach of duty. It is the business of Courts to administer justice according to the law such as it is, not according to the Judge's idea of what the law ought to be."

I entirely concur with Mr. Justice Macpherson. My brother Judge Warden and the other Judges of this court agree with me. But we have been referred to a case decided by this Court on the 13th of March 1863. The facts of that case, as far as they can be collected from the defendant's petition to the High Court, are, that Bháichand obtained a decree against the defendant's *múnim* in the late Supreme Court, and applied to the Puná District Judge to have the defendant's property in Puná placed under attachment in execution of that decree. After the property was thus attached, the defendant entered into a compromise with the plaintiff, and paid him Rs. 4,000 in cash, and arranged to pay the remainder by instalments. The attachment was then removed on the application of the plaintiff; and the defendant thereupon paid the first instalment. Before the second instalment was due, the plaintiff again applied to the District Judge to have the property attached again; and, though the defendant pleaded the abovementioned compromise, the District Judge refused to recognise the adjustment as it was made out of court, and was not certified

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to the Court by the person in whose favour the decree had been made. This order was reversed by Sausse, C.J., Forbes and Newton, JJ.

I think this decision may be supported upon the ground that when a party who causes a person to be taken in execution of a decree or attaches his property, after the attachment is laid or the person is sent to gaol, applies to have the attachment set aside, or the debtor set at large, without stating why he does so, he must be taken to have had his decree satisfied ; and in cases where the decree is partly satisfied, he must so state to the court, and show what the adjustment really was ; and if he neglects to do so, and keeps back that information, he must be held to have received satisfaction in full. However, the decision of the 13th of March 1863 does not appear to have gone to that extent.

In the present case the defendant's property was not under attachment, but his person was. The defendant is put into gaol, and then the plaintiff petitions to have his application cancelled and the defendant discharged ; but he does not admit that any adjustment was made at the time : and yet I cannot conceive that the plaintiff did all this for nothing. It will be rather a favour to him that we do not put the strictest construction upon his act, but give him an opportunity of proving how far the decree was satisfied.

I think the justice of the case will be met by directing the Judge to inquire what arrangements or adjustments were made, so that the plaintiff may not take advantage of his own omission to do what he ought to have done.

WARDEN, J. :—I concur.

PER CURIAM :—The Judge is ordered to inquire what was the arrangement or adjustment upon which the plaintiff petitioned for the release of the defendant from imprisonment, and the cancelling of his application for the attachment, and to give effect to whatever arrangement or adjustment he may find to have been so made. Costs of this application to follow the result of the inquiry.

*Special Appeal No. 642 of 1866.*

1867.  
May 1.

NASARVA'NJI HORMASJI *et al.* .... *Appellants.*  
NA'RA'YAN TRIMBAK PA'TI'L *et al.* ... *Respondents.*

INA'MDA'R—"Suti" tenure—Sälset—Agent.

An INA'MDA'R to whom a village has been granted by Government, though bound to respect all existing tenant rights, is under no obligation to grant unoccupied lands in "Suti" or other permanent tenure, or to regrant on the same tenure lapsed sutí lands; nor does the mere taking up of lands in such a village constitute the occupiers sutí tenants.

An inámdár's agent cannot, without express authority from his principal, grant lands on sutí or other permanent tenure.

THIS was a special appeal from the decision of R. H. Pinhey, Judge of the Konkan District, reversing, in Appeal Suit No. 71 of 1866, the decree of the Principal Sadr Amín at Tháná.

The case was argued before TUCKER and GIBBS, JJ.

*Dhirajlál Mathurádás* for the appellant.

*Vishvanáth Náráyaṇ Mandlik* for the respondent.

The facts of the case, so far as material, appear from the judgment of the Court, which was delivered this day by

TUCKER, J.:—This suit was instituted by the plaintiffs as inámdárs of the villages of Valvai and Vaḍván, Táluká Sálset, District Konkan, against their agent, the defendant Náráyaṇ Trimbak Páti'l, to recover from him—1st, certain sums which, it was alleged, he had embezzled during his management; 2ndly, damages for loss occasioned by his not having accounted for certain sums which had passed through his hands; 3rdly, certain account books, which he had improperly detained; 4thly, to recover from him and the other defendants, Parbhudás Bhavánidás and Lakhmidás Ambaidás, certain lands in each of the villages above named, which, it was alleged, he had fraudulently appropriated, or had fraudulently alienated to the other defendants.

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The principal defendant, Náráyan, admitted that he had been the plaintiff's agent in the management of the said villages from A.D. 1846 to A.D. 1862; but denied that he had committed any embezzlement, or occasioned any loss, by neglect or otherwise, or that he had kept back any books, or taken up lands for himself, or alienated lands to any other persons, in any illegitimate manner. He also pleaded that the claim with respect to several of the items was barred by the law of limitation.

The defendants Nos. 2 and 3 pleaded that the lands which the plaintiffs sought to recover from them had been assigned to them by the defendant No. 1, who had a good title; and that the plaintiffs were aware of the assignment, and could not now demand to have it set aside.

The Principal Sadr Amín of Tháná, who tried the original suit, gave a decree in the plaintiff's favour, on the first three branches of the claim, and also ordered the restoration of all the land sued for, with the exception of 10 *mude*, 10½ *phare*, and 3½ *páyaliá* in Vádvan, as he held it established that the defendant No. 1 had committed the fraudulent acts alleged, and had improperly appropriated and alienated the lands in dispute.

On appeal, the District Judge of Tháná reversed the above decree, and rejected the entire claim of the plaintiffs with costs: as he held that no fraudulent acts on the part of the defendant Náráyan had been established; and that it was competent to him to take up lands on the *sutí* tenure, and to assign them to the other defendants.

In special appeal, it has been contended that the District Judge has misconstrued the Commissioner's Report, on which the Principal Sadr Amín's judgment was based, which clearly held fraud on the agent's part to have been established; that he has also misinterpreted the plaintiff's rights under the grant of the villages made to him by Government, and has committed an error in law in holding that appropriation of lands by the defendant No. 1, or alienation to the other de-

fendants, to the detriment of his employers, would be binding upon them under any circumstances.

We are of opinion that the objections taken to the District Judge's finding with respect to the first three items of the claim, *i.e.*, the demand on account of money embezzled, loss occasioned by neglect, and the alleged retention of account books, have not been made out; but we consider that the District Judge has ruled erroneously in holding that the defendant Náráyaṇ could, without the express assent of his employers, take up lands himself on the sutí tenure, or re-grant on the sutí tenure to other persons lands which had been relinquished by the sutídárs to the inámdárs or their agents. On examining the sanad or deed under which the villages were granted by Government to the plaintiffs, it would seem that all the rights of Government in the lands, which were waste or unoccupied at the time of the grant, were conveyed to the plaintiffs: that is to say, that the plaintiffs became absolute proprietors of the said lands, and that they were under no obligation to let the said lands to tenants on the sutí or other permanent tenure, though they were bound to respect all existing tenant-rights. It follows, then, that the defendant Náráyaṇ, as agent of the plaintiffs, could not, without their express authority, create any new tenancies of a permanent character, nor, in the case of lands held on the sutí tenure at the time of the grant which might have intermediately lapsed, owing to the default or surrender of the holders, had he any power to re-grant the said lands on any tenure which would be detrimental to the proprietary rights of the inámdárs. Government, in the neighbouring villages, may have granted a perpetual tenant-right to the occupants of land under them; but no inámdár is bound to follow the practice of Government in this respect, nor can it be held that the mere taking up of lands in an inám village confers such rights, without an express grant or concession from the inámdárs. It is clear, then, that the new tenants, who may have been admitted by the defendant Náráyaṇ, hold only as tenants from year to year, and that they may be ejected by the

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superior landlord, *i.e.*, the plaintiffs, after six months' notice. In the present case the institution of the present suit, which has lasted for more than two years, may be held to be sufficient notice; and as it is not alleged that any of the present occupants hold under grants made by the plaintiffs personally, or by their express authority, the plaintiffs will be entitled to recover any of the lands mentioned in the plaint, which may be in the possession of any of the defendants: unless the defendants can establish that any of these lands were held by them on the sutí tenure prior to the grant of the villages to the plaintiffs; or that they (the defendants) have acquired, in some legitimate manner, the rights of the ancient sutídárs, prior to any lapse or surrender of the estates of the said ancient sutídárs to the inámdárs.

We must, therefore, reverse the decree of the District Judge with respect to the lands, and remand the suit to the lower appellate court, that the rights of the defendants in each parcel of land specified in the plaint may be inquired into, and that a decree may be passed in favour of the plaintiffs for all such pieces of land which the defendants may not be able to show to have been held by them on the sutí tenure prior to the grant of the villages of Valvai and Vaḍván to the plaintiffs, or to have been acquired by them (the defendants) in some legitimate manner from the ancient sutídárs prior to any lapse or surrender of the said sutí estates to the inámdárs.

*Decree reversed and suit remanded.*

*Regular Appeal No. 4 of 1866.*

1867.  
June 20.

LAKSHMI'BA'I, widow of MA'DHAVRAV GOVIND. *Appellant.*  
GANESH ANTÁJI *et al.* .... *Respondents.*

*Certificate of Administration—Minor—Collector—Act XX.*  
*of 1864, Sec. 11.*

*Held* that where the Court, under Sec. 11 of Act XX. of 1864 (Minors' Act), directs a certificate of administration to the estate of a minor to be granted to the Collector of a district, such certificate must extend to the moveable as well as the immoveable estate of the minor.

THIS was an appeal from an order made by the Honorable G. A. Hobart, District Judge of Khándesh, under Sec. 11 of Act XX. of 1864.

The facts of the case were these:—

Mádhavráv Govind died possessed of both moveable and immoveable property, leaving a widow named Lakshmibái, the present appellant, a son named Náráyaṇráv, and Ramábái, the wife of the latter. Náráyaṇráv died shortly after his father, and his widow Rámábái succeeded to his estate.

Rámábai, being a minor, her father, Antáji, applied for a certificate of administration to her estate, and to be appointed her guardian. Lakshmibái, the mother-in-law of the minor, opposed the application.

The District Judge ordered a certificate of administration to the immoveable property to be granted to the Collector of Khándesh, a certificate of administration to the moveable property to be granted to the Názar of the Khándesh Adálat, and Bayábái, the wife of Antáji, and mother of the minor, to be appointed her guardian. Against this order Lakshmibái appealed.

The case was heard before TUCKER and GIBBS, JJ.

*Shántáram Náráyan*, for the appellant, contended that the order of the Judge directing a certificate of administration to the immoveable property to be granted to the Collector, and a certificate of administration to the moveable property to be granted to the Názar, was illegal, under Sec.

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ANTA'JI. 11 of Act XX. of 1864 (a), the word "estate" in the closing part of the section meaning the entire estate of the minor He also contended that his client, the appellant, was entitled to be granted a certificate of administration.

*Vishvanáth Náráyan Mandlik*, for the Názar, argued that the order was correct, the intention of the Legislature being that the Collector should be appointed to take charge of the immoveable property only.

*Dhirajlál Mathurádás* appeared for the Collector.

PER CURIAM :—"The Court see no reason to interfere with the order of the District Judge, so far as it refused to give a certificate of administration to the estate of the deceased Náráyanráv Mádhav to Lakshmíbái, the present appellant ; but the Court are of opinion that Sec. 11 of Act XX. of 1864 requires that, if the case is a fit one for the appointment of the Collector as administrator, he should be given a certificate of administration to the *entire* estate. The Court therefore directs that the Judge do amend his order dated 21st June 1866 by appointing the Collector to administer to the entire estate, and granting to him the necessary certificate of administration. This order will in no way affect the appointment of a guardian to the person of the minor Rámábái made by the Judge, or the order made for the maintenance of the said minor, which appointment and order have not been appealed against.

(a) *Sec. 11 of Act XX. of 1864* :—If the estate of the minor consists, in whole or in part, of land or any interest in land, the Court may direct the Collector of the district in which the larger part of the same may be situated to take charge of the estate.

July 9.

*Special Appeal No. 4 of 1867.*

*GANPATRA'V VIRESHVAR et al. ....Appellants.*  
*VITHOBA' KHANDA'PPA' et al. ....Respondents.*

*Hindú Law—Adoption—Sister's Son.*

It is now well-settled law that the adoption of a sister's son by a Hindú of the Vaishya caste is valid.

THIS was a special appeal from the decision of R. H. Pinhey, District Judge of the Konkan, confirming, in Appeal Suit No. 256 of 1864, the decree of the Munsif of Panvel.

The special appellants, the plaintiffs in the original suit, brought this action for the recovery of the possession of a house, now occupied by the defendant Viṭhobá Khandáppá Gulve, and a year's rent thereof, alleging that Mhálsábái (deceased), the widow, and A'ppá, the son, of Khandáppá Gulve, deceased, having borrowed a certain sum of money from them, had executed a deed stipulating that if the money advanced was not paid within one year, the house now sued for was to be considered as sold to the plaintiffs. After the period agreed upon had elapsed, the plaintiffs alleged that the house in question was leased to the grantors of the deed, namely, Mhálsábái and A'ppá.

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The defendant Bhágú, the widow of A'ppá, did not dispute the genuineness of the deed sued on, but stated that she was not liable for the year's rent, as she had not taken the estate of the deceased Mhálsábái and A'ppá.

The defence of Viṭhoba Khandáppá was that the house was his and in his possession ; that neither Mhálsábái, his mother, nor A'ppá, was competent either to mortgage or sell it, and that Mhálsábái got money from him for her maintenance when required.

Viṭhobá Khandáppá was Khandáppá Gulve's sister's only son, whom he (Khandáppá) had adopted during his lifetime, and A'ppá was a son whom Mhálsábái had adopted after the death of Khandáppá. The parties were Lingáyaṭs by caste. The Munsif held that the house in question was in the possession of Viṭhobá, and that neither Mhálsábái nor A'ppá was competent to mortgage or sell it.

On appeal, the District Judge affirmed the Munsif's decree, on the ground that the right of Viṭhobá had already been determined in appeal : *Mhálsábái v. Viṭhobá* (10th September 1862).

Against this decision a Special Appeal (No. 830 of 1864) was preferred on the ground, amongst others, that the District Judge was in error in considering the order of the High Court passed in a Miscellaneous Petition regarding the grant of a certificate as binding upon the parties to this suit.

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After two remands, the District Court found that Vithobā was the legally adopted son of Khandáppā, and that the adoption of A'ppā by Mhálsábái was invalid ; and recorded the following judgment :—

“ I am of opinion that the witnesses most fully prove the adoption of Vithobā by Khandáppā in the most formal and public way, before the Mámlatdár and leading inhabitants of Panvel, with the consent of Mhálsábái, Khandáppā's wife, and with the consent of Vithobā's mother. An objection is raised against the validity of the adoption, because Vithobā's mother was Khandáppā's sister ; but this objection does not apply to a Shudra like Vithobā (Strange's Manual, Chap. III. on Adoption, Sec. 86). Moreover, although Vithobā is the only son of Khandáppā's sister, and although for argument's sake it may be allowed he ought not to have been given in adoption to Khandáppā, still, as he was adopted by Khandáppā, the adoption, although it ought not to have been made, cannot be set aside. \* \* \* The whole of the chapter in Strange shows that as Khandáppā has adopted Vithobā, no necessity existed for the adoption of a second son by Mhálsábái, and that she was therefore incompetent to make any such adoption.”

The case came on for hearing before COUCH, C.J., NEWTON and WARDEN, JJ.

*Dhirajlál Mathurádás*, for the appellants, argued that Vithobā, being a Lingáyaṭ, was not a Shudra, but a Vaishya ; and therefore his adoption by Khandáppā, his mother's brother, was invalid, and ought to be set aside, and A'ppā's adoption upheld.

*Vishvanáth N. Mandlik*, for the respondent, contended that Lingáyaṭs were *Vritti Vaishyas*, and cited Steele, Summary, p. 105, that adoption by a childless Hindú of the Vaishya caste of his sister's son was valid : *Ramalinga Pillai v. Sudasiva Pillai* (a) ; that, according to Hindú law, a second adoption of a son, the first adopted son being alive and

(a) 9 Moor. Ind. App. 506.

retaining the character of a son, was illegal and void : *Run-gama v. Atchama and others (b)*.

COUCH, C. J. :—It appears to me that the law, as stated in Strange's Manual and the cases before the Privy Council, permits the adoption of a sister's son, and that, when it is once done, it cannot be set aside. We must confirm the decree of the lower court with costs.

(b) 4 Moor. Ind. App. I.

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KHANDA'PPA'  
et al.

Special Appeal No. 334 of 1867.

Aug. 23.

ARJU'NA valad BHIVA' ..... *Appellant.*  
BHAVA'N valad NIMBA'JI' et al. ..... *Respondents.*

*Mirásdár—Rázinámá—Limitation—Act XIV. of 1859, Sec. 1., Cl. 12.*

In a suit brought by a *mirásdár* to recover possession of *mirás* land, which his ancestor had resigned to Government, against a holder to whom Government had subsequently granted it, *it was held* that the statute of limitations commenced to run against the *mirásdár* and his heirs, from the time the *mirási* was resigned, and not from the date of the subsequent grant of it by Government.

To the validity of a resignation of *mirás* land by a *mirásdár* to Government the consent of his heirs is not requisite.

THIS was a Special Appeal from the decision of R. H. Hunter, Acting Senior Assistant Judge of Puná, in Appeal Suit No. 245 of 1865, reversing the decree of the Munsif of Bársi.

The plaintiffs sued to recover possession of their ancestral *mirás* field (Survey No. 36), together with the well and trees thereon in the village of Arjiengád, in the Solapúr division of the Puná District. They alleged that they enjoyed the field till 1846, when, in consequence of their inability to cultivate it, they allowed it to remain waste, and the defendant took it up in 1853.

The defendant answered that the field was not the *mirás* of the plaintiffs, but that of one Ránu Máli; that plaintiff No. 2 held it as his tenant for some time and then threw it up; that one Mhátárá, grandfather of plaintiff No. 1, suc-

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ceeded, but that he resigned it in 1847, and that the land continued to be waste till 1853, when he, the defendant, took it up from Government, and had since been in possession.

The Munsif held that though the land in dispute had been the mirás of the plaintiffs, yet Mhátárá, the grandfather of plaintiff No. 1, resigned it in 1847, and that the plaintiffs having had no possession for a period of more than twelve years, their suit was barred by Sec. 1, Cl. 12, of the Limitation Act.

The Acting Senior Assistant Judge was of opinion that the field was originally the mirás of Ránú Máli; that in a division of family property it went to the plaintiffs' share; that Mhátárá resigned it in 1847, but without any authority to do so, because the plaintiffs, one of whom is his grandson, and the other his brother, had not consented to his act, such consent being in his opinion necessary for the alienation of ancestral property; that as long as Mhátárá was alive there was no adverse possession, nor indeed till 1853, when the defendant first took it up, and that, therefore, the cause of action arose in that year. He, therefore, reversed the Munsif's decree, and awarded the plaintiffs' claim.

The case was heard before WARDEN and GIBBS, JJ.

*Shántáram Náráyaṇ* for the appellant.

*Dhirájlál Mathurádás* for the respondents.

WARDEN, J.:—We consider that the court below was in error in considering that a mirásdár cannot give in a rázi-námá and resign land without the consent of his heirs; such has never been held to be law by this Court.

With regard to the point of limitation, we are of opinion that the lower appellate court was also in error in holding that the cause of action did not arise until the defendant took up the land. It has been ruled in Special Appeal No. 680 of 1865, decided by Mr. Justice Newton and Mr. Justice Gibbs on the 25th of April 1866, that where a mirásdár gives up his mirás land the cause of action for its recovery dates from the day of his giving it up. In this case the mirásdár

gave in his rázinámá in 1847, and counting twelve years from that time the present suit is barred. We, therefore, reverse the decree of the Acting Senior Assistant Judge, and confirm that of the Munsif.

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GIBBS, J., concurred.

*Acting Senior Assistant Judge's decree reversed,  
and the Munsif's confirmed.*

—♦—  
Special Appeal No. 307 of 1867.

Sept. 27.

VALLABHRA'M SHIVNA'RA'YAN ..... *Appellant.*

BA'I HARIGANGA', by her guardian, DAYA'-

SHANKAR KRISHNA'JI ..... *Respondent.*

*Hindú Law—Inheritance—Dumbness—Disqualification—Hindú Widow.*

Dumbness, if from birth, is a cause of disherison in females as well as in males.

A Hindú widow born dumb is, according to the law prevailing on this side of India, incapable of inheriting from her husband.

Such widow is, however, entitled to her *stridhan*, and to maintenance out of the property of her deceased husband.

Case remanded to have the widow made a party to the suit, that it might be determined whether she was born dumb, and if so, that the amount of her *stridhan* and of her maintenance might be ascertained.

THIS was a Special Appeal from the decision of C. G. Kemball, District Judge of Súrat, confirming, in Appeal Suit No. 236 of 1866, the decision of the Munsif of Súrat.

The Special Appeal was heard before GIBBS and WAEDEN, JJ.

Nánábhái Haridás for the appellant.

Shántárám Náráyan for the respondent.

The facts of the case appear from the judgment of the Court, delivered by

GIBBS, J. :—In this case the guardian of a female child sued to recover from the defendant certain jewels and other property, moveable and immoveable, which had come into

1867. VALLABHRA'M SHIVNA'RA' his possession at the time her father, who was the defendant's uncle, died in the defendant's house.

TAN v. BA'I HARI GANGA'. The defence was that the guardian had no claim ; that the jewels were not with the defendant ; that the property was not properly valued ; and the defendant further set up a claim for Rs. 300, which he had expended for funeral ceremonies of the deceased.

The Munsif awarded all the claim save 1½ *bighás* of land ; and disallowed the set-off for funeral expenses.

In appeal this judgment was confirmed.

In special appeal it has been urged that Harigangá, being only a daughter, could not sue, as her mother is still living ; and this has led to a very interesting and learned argument on a point of Hindú law, namely, whether the mother, who is stated to be dumb, is not thereby prevented from inheriting.

It is necessary here to observe that the claim includes the *stridhan* of the widow, as well as the family property, as it will affect our final order.

Mr. Shántárám has argued, for the respondent, that the Hindú law clearly lays down that dumbness is a ground for disinheritance, and has quoted the following authorities : Manú, Sir W. Jones, Trans. ch. ix., v. 201 ; 1 Bor. 453 ; 2 Bor. 713 ; 1 Strange 164 ; Strange's Manual, p. 57, rule 225 ; Stokes' *Miták.*, p. 457. He urges that although the adjectives in Manú, chap. ix., v. 201, are in the masculine, still they are not used so restrictively, as the commentator on the *Mitákshará* observes, and as also does Mr. Borrodaile, in his note on the case quoted by him, 1 Bor. 454. Hence the present suit is properly brought.

Mr. Nánábhái, on the other hand, urges that Sir T. Strange, and also Mr. Justice Strange in his Manual, both depend on the *Mitákshará* annotator. In the original text of *Yádnyávalkya* the word "dumb" is not included ; and in the text in Manú all the adjectives used are masculine. It is the commentator on the *Mitákshará* who says Manú did not restrict it to males ; and Sir W. Jones in his translation

of Manú is incorrect, for he has put in the word "persons," the original running thus: "those born blind," &c.; and the commentator on Manú, Kúllúkbhāṭ, does not say that v. 201 applies to females. The best commentator on Manú is Manú or his commentators, and they are silent; hence 1 Bor. 453 is founded solely on the *Mitákshará*, and not binding.

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Sir T. Strange (Vol. I., p. 213) says the disqualification is owing to the blind, dumb, &c. not being able to perform the *shrádhs*, as all wealth is for enjoyment here and spiritual benefit hereafter; and sons, who perform *shrádhs* for the benefit of their deceased parents, inherit wealth. But there is no cause shown why a dumb woman should be prohibited from inheriting on account of her non-performance of spiritual acts for the benefit of her deceased husband, as any male relative, however distant, performs the *shrádhs* in preference to the widow, although her sex is in itself no disqualification to her actually performing the ceremony. But there is another point. If dumbness disqualifies, it is in the same category as blindness, lameness, &c., and it must be from *birth* (1 Strange 214). But in truth it is not the dumbness or the blindness &c. which prevents a person performing the *shrádhs*. According to the Hindú lawyers, such and other infirmities are the signs of original sin, and it is the sin which is the cause of disinheritance; and this is used as a ground for bringing men to repentance. The *stridhan*, however, would not be affected by this; the widow, though dumb, may recover this portion of the property; the daughter cannot. The District Judge must try whether the dumbness is from birth, and the amount of the *stridhan*.

Mr. Shántarám, in reply, admits that the original sin is the cause—*i.e.*, sin committed in a former state. But this case must be settled according to the *Mitákshará*, which is the authority on this side of India, and not *Yádnyavalkya*; and if there is a rule in the former which makes dumbness a ground for disinheritance, nothing but a legislative enactment can remove it. It is true that different lawyers differ in the reasons they give for disinheritance; and we can only arrive at a satisfactory conclusion from collating them (see

1867. Colebrooke's Digest, chap. v., bk. 5, s. 1, title Inheritance).  
 VALLABHRA'M As, therefore, from this we find original sin is the cause, it  
 SHIVNA'RA'. equally affects females as well as males. The arguments  
 YAN regarding the use of the masculine gender are not of  
 v. moment, having been disposed of by Vidnyáñeshvar, as ex-  
 BA'I HARI- plained by Borradaile and others. There is no law, how-  
 GANGA'. ever, which prevents a dumb widow having her own  
*stridhan*.

This case has been most carefully argued, and the Court is much indebted to the pleaders for having brought before it the array of authorities quoted by both sides. In the words of Sir Thomas Strange, it did appear to us "harsh to divest of their heritable rights not only idiots and madmen, but the deaf, the dumb, and the blind;" and finding that the latest authority for a decision in a similar case, where blindness was the objection raised, dated as far back as 1817, and was passed in the Provincial Court of Appeal in Gujarát, we considered that the matter should not be decided until it had been argued afresh, and had received the fullest consideration. Now after carefully weighing the arguments on both sides, and examining the authorities quoted, I reluctantly come to the conclusion that dumbness is, under the Hindú law, a bar to inheritance.

The *Mitákshará* is the book of greatest authority on this side of India, and although it is true that the original text of *Yádnyavalkya* does not contain the word "dumb," while it does "blind," yet it also adds "as well as others similarly disqualified," and the commentator Vidnyáñeshvar explains this as including "a person deaf, dumb, or wanting any organ," and supports his comment by quoting Manú, who clearly includes the "dumb."

In considering the causes for what to European minds appears a harsh law, there appears no doubt but that the principle on which it is based is that such infirmities as dumbness, deafness, or the like, are considered by persons of the Hindú persuasion as signs of sin committed in a former state of existence, and hence as proving a state of impurity in the unhappy victim, which would, if a man,

render him incompetent to perform those religious ceremonies for the dead on which their future happiness is considered to depend. Now were the dumb person in this case a male, I should have no doubt, the Hindú law authorities being, I think, clear on the point; but a doubt has arisen from the fact of the party being a female; and the question arises, are females likewise debarred from inheriting. The argument that all the adjectives in the passage in Manú are in the masculine gender would, at first sight, raise a doubt as to whether they could be applied to females; but Vidnyáñeshvar, in his day, laid down that Manú did not use the masculine gender restrictively in speaking of the persons so afflicted, but that wives, daughters, mothers, or other female relatives were equally affected as males; and there is no doubt that, although any male relative is preferable, still a woman is not by her sex prevented from performing the ceremonies for her dead, and should, in consequence, be in a position to be able to do so. I must, therefore, decide that if this widow has been dumb from her birth, she is debarred from inheriting, and that under such circumstances the daughter is, by her guardian, the proper person to sue. But there is no finding on the point when dumbness commenced, and there are other matters which arise and on which this court cannot decide—*e.g.*, it is admitted by the plaintiff that a portion of the jewels claimed is the widow's *stridhan*; and as she was not prohibited from marriage, neither should she, though found to have been dumb from birth, be incapable of possessing the marriage gifts. What, therefore, the amount of the *stridhan* is must be determined. Again, the entire property of the deceased is involved in this suit, and the Hindú law, while it clearly bars the dumb widow from inheriting, also as clearly lays down that she should be entitled to maintenance; and in the event of dumbness from birth being established, and in consequence her inability to inherit, the amount of this should be settled. The decree of the District Judge must be reversed, the suit returned for re-trial, and, as I think that justice requires that the whole matter should be determined at once, it would be better to reverse both the decree of the

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1867. District Court and the decree of the Munsif, and remand the case to the court of first instance, in order that the widow may be made a party (for she is not, like an idiot or lunatic, incapable of asserting her rights), and the following issues determined :—

VALLABHRA'M SHIVNA'RATAN v. BA'T HARI-GANGA.—

1. Has the widow been dumb from birth. If this is found in the negative, she is capable of inheritance, and must recover before her daughter; but if it be found in the affirmative, then—
2. What portion of the property in dispute should be awarded the widow, as being her *stridhan*.
3. What amount of maintenance should be awarded to the widow, and on what property should it be secured.

And let the court raise any other issues which it may deem necessary for the proper disposal of the suit, and let fresh evidence, if needed, be received on the new issues.

Costs hitherto to be borne by the special appellant, who has failed entirely in his defence. Future costs to be determined in the new decree.

*Decrees of both the lower courts reversed, and the suit remanded for re-trial.*

Nov. 22.

*Special Appeal No. 528 of 1867.*

BHAGVA'N JAYARA'M.....*Appellant.*  
VITHOBA' GOVIND.....*Respondent.*

*Registration—Act XVI. of 1864, Secs. 15 and 29.*

*Held* in a suit to compel registration under Act XVI. of 1864, Sec. 15, that where Courts found that the requirements of Sec. 29 of the Act had not been complied with before the Registrar of Assurances, he was justified in refusing to register the deed.

THIS was a Special Appeal from the decision of the Honorable G. A. Hobart, District Judge of Khândesh, in Appeal Suit No. 178 of 1866.

The plaintiff sued to obtain an order that the Deputy Registrar of Assurances at Jámner should register an instrument purporting to be a deed of sale of a field, dated the 11th of December 1865, which the Deputy Registrar refused

to register, on the ground of the defendant's non-appearance before him to admit its execution.

The defendant pleaded that the full amount of the consideration had not been paid to him.

Both the lower courts were of opinion that, under Act XVI. of 1864, no registration of an instrument could take place without the admission of the executing party or his representative before the Deputy Registrar of its execution by him. No proof of the execution of the instrument, if given otherwise than by such admission before the Registrar, would be an equivalent. Such admission made in such a manner was, under the Act (a), *a sine qua non*.

The Special Appeal was argued before WARDEN and GIBBS, JJ.

*Pándurang Balibhadrá* for the appellant.

*Nánábhái Haridás* for the respondent.

PER CURIAM:—We agree in thinking that the ruling in

(a) Act XVI. of 1864, Sec. 15 :—“ If a District Registrar or Deputy Registrar shall refuse to register an instrument falling within the provisions of Sec. 13, it shall be lawful for any person interested to institute a regular suit in order to establish his right to have such instrument registered, and the instrument shall be admissible in evidence for the purpose of such suit. The District Registrar or Deputy Registrar who refused to register such instrument shall not be made a party to any such suit, but the Court may, if it shall think proper, order such District Registrar or Deputy Registrar to register the instrument, and he shall be bound to comply with the order. The petition of plaintiff in any suit instituted under this section shall be written on paper bearing a stamp of the value of eight annas.”

Sec. 29 :—“ On the parties to any instrument, their heirs, administrators, or assigns, or the agents of such parties authorised as hereinbefore provided, appearing before the District Registrar or Deputy Registrar for the purpose of obtaining the registration of such instrument, he shall proceed to inquire whether such instrument was executed or not by all the parties thereto by whom it purports to have been executed, and to satisfy himself of the right of any person to appear as the heir, administrator, or assign of any party whom he shall claim to represent, or, if any party shall appear by agent, of the authority of such agent. If all the parties executing the instrument appear personally before the District Registrar or Deputy Registrar and are personally known to him, or, in case they are not personally known to him, if they satisfy him that they are the parties they represent themselves to be, and if they all admit the execution of the instrument, or in the case of any party appearing by authorised agent, if such agent shall admit the execution of the instrument, the District Registrar or Deputy Registrar shall register the same.”

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*Sajanji valad Godaji v. Anaji valad Lakshman and others* (R. A. No. 3 of 1866) (b) must be followed in this case. The Registrar could only register a document of this nature, under Act XVI. of 1864, when all the requirements of Sec. 29 had been carried out. And as these have not been complied with in this case, we hold the view taken by the lower courts to be correct.

*Decree affirmed.*

(b) The following decision in the above case was given by TUCKER and GIBBS, JJ., 31st August 1866 :—

“This is a suit instituted by plaintiff in the Court of the District Judge of Ahmednagar to try his right to register an instrument which purported to have been executed by the three defendants on 13th March 1860, and to have conveyed an eighth-share in the Pātiliki watan of Datoli and the lands appurtenant thereto. The deed was presented to the Deputy Registrar of Sinar within one year of the passing of Act XVI. of 1864, under Sec. 17 of that Act, and registration was refused on the ground that the grantors did not acknowledge execution, and that execution had not been satisfactorily proved. It is not shown whether any appeal from this order was made to the District Registrar or not. Two of the defendants, before the District Judge, denied execution, and the District Judge held that it was not established that on the 13th March 1860, or on any subsequent date, all the defendants had executed the deed, and that therefore the refusal to register the deed was proper.

“The points taken in appeal are : that the decree is contrary to evidence ; and that plaintiff has additional evidence to show that the third defendant, Yeshu, executed the deed.

“We are of opinion that the only point which the Judge had to decide was whether the plaintiff, under the circumstances described, was entitled to register under Act XVI. of 1864 ; and we consider that as none of the parties who were alleged to have executed the deed admitted execution before the Deputy Registrar, as required by Sec. 29 of the said Act, the refusal of that officer was correct.

“We abstain from giving any opinion whether a person in the position of this plaintiff, on whom registration was not compulsory, and who, as the deed was executed before Act XVI. of 1864 came into operation, was not prevented from producing it in evidence in a court of justice, under the provision of Sec. 13 of the said Act, was competent to bring an action under Sec. 15 without entering upon this point ; and for the reasons above given we affirm the lower court's decree. All costs on appellant.”

NOTE.—The result of this case seems to be that in a suit to compel registration under Sec. 15, the Court will only inquire whether the Register is justified in refusing to register a deed under Sec. 29.

*Sed quære*, Ought not the Court also, under Sec. 15, to adjudicate on the right of the plaintiff as against the defendant to have the document registered ? and in that view should not the fact of execution, and circumstances of the case, as well as the occurrences before the Registrar, be considered ?—ED.

## Special Appeal No. 194 of 1866.

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Dec. 10.

U'MA'JI valad MA'NA'JI PA'TI'L DUMA'LE...Appellant.  
HARI RA'MCHANDRA KULKARNI'.....Respondent.

*Hindú Law—Mortgage—Possession—Registration—Priority.*

H. and U. were mortgagees of one V. U.'s mortgage was prior in point of time and registered. H. and U. obtained each a decree against V. U.'s decree was prior; but H., having applied for execution sooner, was put into possession. U. subsequently applied for execution and dispossessed H.

*Held*, in a suit by H. against U. to recover possession of the mortgaged premises, that registration made U.'s mortgage complete, though he did not obtain possession of the mortgaged property at the time when the deed to him was executed, and that any subsequent disposition of the equity of redemption by the mortgagor would be subject to his mortgage.

THIS was a Special Appeal against the decision of A. St. John Richardson, Judge of the district of Ahmednagar, reversing the decree of the Munsif of Ráhuri.

The facts sufficiently appear in the judgment of

TUCKER, J.:—The plaintiff, Hari Rámchandra, brought this action to recover possession of a field of which he asserted that he had been wrongfully dispossessed by the defendant, U'máji.

The field was originally the property of one Vithú, who mortgaged it on the 10th of December 1860 to the defendant, U'máji, for Rs. 99-11-0, which deed was registered on the 14th of December 1860. He (Vithú) then mortgaged the same field to Hari on the 19th of October 1861 for Rs. 13. This deed has not been recorded, and it is not alleged to have been registered. The defendant, U'máji, brought a suit against the mortgagor, and obtained a decree on the 27th of January 1863 for the possession of the property, which he took no immediate steps to execute; and the plaintiff, Hari, obtained a similar decree against the mortgagor on the 10th of February 1863, which he executed on the 29th of February 1863, on which date the field was delivered into his possession by the civil court. Afterwards, in May 1864, the defendant, U'máji, applied for execution of his prior decree, and in execution of that decree Hari was

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dispossessed on the 17th of May 1864, which caused him to institute the present suit.

The Munsif of Ráhuri held that the defendant, U'máji, had rightly been put in possession of the field in dispute under his decree against Víthú, as Hari was only in possession under Víthú; and he therefore threw out the plaintiff's claim.

The District Judge reversed this decision, and awarded the field to the plaintiff, Hari, as he held that Hari having obtained a decree declaring his right to the field, and having been put in possession by the Civil Court, he could not properly be dispossessed by the defendant, U'máji, notwithstanding that the latter had a prior decree against the same property.

We are of opinion that the decision of the Munsif was correct, while that of the District Judge was erroneous. Both parties were only mortgagees, and the defendant U'máji's mortgage being prior in point of time and registered, he was entitled to have possession of the mortgaged property till his claim should be satisfied; and in execution of his decree, which was also prior in point of time to the decree of the plaintiff, he would be entitled to dispossess the plaintiff, Hari, who had got in possession under a subsequent unregistered mortgage; and it appears to us immaterial whether the plaintiff had obtained his possession through a decree of a Civil Court, or in any other manner. The first mortgagee being thus in possession, the puisne mortgagee could not bring an action to recover the field without paying off the prior incumbrance; and as there is no offer to redeem in his present plaint, the plaintiff's claim must be rejected. Registration made the defendant's mortgage complete, though he did not obtain possession of the property mortgaged at the time the deed to him was executed, and any subsequent disposition of the equity of redemption by the mortgagor would be subject to the first mortgagee's lien. We therefore reverse the decree of the District Judge, and affirm the decree of the Munsif. All costs on the special respondent.

GIBBS, J., concurred.

*District Judge's decree reversed, and the Munsif's confirmed.*

*Civil Petition.*1867.  
July 26.*Ex parte DESA'I KALYA'NRA'I HAKUMATRA'I et al.**Stamp—Petitions of Appeal—Special Appeal—Act XXVI. of 1867.  
Cl. 11 of Schedule B.*

Petitions of special appeal to the High Court at Bombay on its Appellate Side must be stamped according to the scale contained in Cl. 11 of Schedule B of Act XXVI. of 1867.

THE petitioner in this case presented a petition of special appeal to the Registrar of the Appellate Side of the High Court. This petition the Registrar refused to receive and file, on the ground of its being insufficiently stamped.

The petitioner objected that under the new Stamp Act (XXVI. of 1867) such petitions do not require any stamp. The matter was then referred to the Court, and was argued on behalf of the petitioners before TUCKER and GIBBS, JJ. Several other cases depended on the decision in this one.

*Nánábháí Haridás* for the petitioner.

TUCKER, J.:—We are called upon to pass orders on a series of applications for special appeal, which the Registrar has declined to receive, as not being sufficiently stamped in accordance with the requirements of the new Stamp Act passed in the present year.

The contention is the same in all these applications, namely, that under the wording of the new Stamp Act, no stamp is required in petitions of appeal to the High Court of Judicature of Bombay in the exercise of its appellate jurisdiction under Sec. 16 of the New Letters Patent. The part of the Act relied upon is Sec. 11 of Schedule B, which is as follows:—

“PLAINT OR APPEAL, Petition of, in suits and appeals not otherwise provided for, instituted in any Civil or Revenue Court, outside the *local limits* of the ordinary Original Civil jurisdiction of the Courts established by Royal Charter, for the recovery of any sum of money, or to obtain possession of any interest, matter, or thing.”

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It has been argued with considerable ingenuity that as the Appellate branch of the High Court cannot be said to be a court *outside* the local limits of the ordinary Original Civil jurisdiction of the courts established by Royal Charter, the provisions regarding stamps on appeals contained in this section do not apply to appeals instituted on the Appellate side of the High Court, and, as there is no other enactment with respect to such appeals, that no stamp for such petitions of appeal in any case is now required by law.

Now, it may be observed that the words in Sec. 11 of Schedule B to the Act of 1867 are almost identical with the words used in the corresponding section of Schedule B to Act X. of 1862. The only difference is that the phrase "not within" is used instead of "outside," and that the words "or Revenue" have been introduced between the words "any Civil" and "Court." At the time the Act of 1862 was passed no High Court was in existence at any of the Presidencies, and on the creation of the High Court at Fort William in Bengal an Act (No. XX. of 1862) was passed with the view of regulating what fees and stamp duties should be levied in the said court, and in Cl. 2 of this Act it was enacted—

"No instrument or writing of any of the kinds specified as requiring a stamp in the Schedule B annexed to the said Act X. of 1862, shall be filed, exhibited, or recorded in, or shall be received or furnished by, the said High Court of Judicature in any case coming before such court in the exercise of its Appellate jurisdiction under Sec. 15 of the said Letters Patent, or in the exercise of its extraordinary Original jurisdiction under Secs. 13 and 23 of the said Letters Patent, or as a court of appeal, reference, or revision under Secs. 26 and 27 of the said Letters Patent, unless such instrument or writing be upon a stamp of a value not less than that indicated by the Schedule B annexed to the said Act X. of 1862 as the proper stamps for similar instruments and writings in the said Sadr Court, anything in Sec. 30 of the said Act to the contrary notwithstanding, but subject to the proviso therein contained;" and it was further enacted

by Sec. 10 of the said Act, "this Act shall apply *mutatis mutandis* to the High Courts of Judicature which may be established at Madras and Bombay under Act 24 and 25 Vict., Chap. 104, for those Presidencies respectively whenever such Courts shall be established. Provided that the powers vested by this Act in the Governor General in Council shall be exercised in the Presidencies of Madras and Bombay by the Governors in Council of those Presidencies respectively."

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This Act continued in force till the 1st of January 1863, and its duration was further prolonged by Acts XXIV. of 1862 and XXXII. of 1863, and it is now in operation.

Sec. 30 of Act X. of 1862 is as follows :—

" Except in any Court of Justice established by Royal Charter, or in any Court of Small Causes, established within the local limits of the jurisdiction of any such Court, no instrument or writing of any of the kinds specified as requiring stamps in the Schedule B annexed to this Act shall be filed, exhibited, or recorded in any Court of Justice or Government Office, or shall be received or furnished by any public officer, unless such instrument or writing be upon a stamp of a value not less than that indicated to be proper for it by the said Schedule B. Provided that nothing in this Act shall be held to repeal any special provision in the Code of Civil Procedure or in any other Act or Regulation for the use of plain or unstamped paper in any judicial proceeding, unless such provision shall be expressly repealed by this Act." From this section it is clear that the Legislature contemplated that the stamps prescribed by Sec. 11 of Schedule B to that Act should be levied in the Sadr Court ; and from Act XX. of 1862 it is also manifest that it was the intention of the Legislature that the stamps prescribed for appeals to the Sadr Court should continue to be levied on the Appellate Side of the High Court, which had taken the place of the Sadr Court. This last Act is still in force, and the only effect of Act XXVI. of 1867 is to substitute the Schedule B annexed to that Act for the schedule which was originally annexed to Act X. of 1862.

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This second or substituted schedule must be read with the light thrown upon it by Act XX. of 1862, from which it is patent that the meaning and intent of the Legislature was that the stamps prescribed in Sec. 11 of the said schedule were to be levied in the case of appeals to the High Court on the Appellate Side; and although the imperfect and very peculiar form of expression used in the section has given some foundation for the present arguments, yet we can, with the light thrown upon the section by Act XX. of 1862, entertain no doubt of the intent of the Legislature in the matter.

We therefore hold that petitions of special appeal to this court must be governed by the section in the schedule to the new Act which the Registrar has applied, and it remains for us to determine in each case whether his objections to the valuation of the claims which have been made in several of the petitions can be sustained. The present petition on a stamp of two rupees must be rejected.

GIBBS, J., concurred.

*Petition rejected.*

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Dec. 18.

*Civil Petition.*

*Ex parte* VITHAL alias GOPAL GANESH BIVALKAR.

*Stamp—Khoti estate—Act XXVI. of 1867.*

*Held*, that a Khoti estate was an estate paying revenue to Government upon which an assessment is temporarily settled, and that a suit for its recovery should be assessed at eight times the annual assessment, under Act XXVI. of 1867; Schedule B, Art. 11, note (a), Sp. Rule 1 for the Bombay Presidency.

THIS was an application for the admission of a special appeal. The suit in the court of first instance was to recover the moiety of a khoti village in the Konkan District. The claim both in the original suit and the appeal was valued, under Act X. of 1862, at Rs. 639-7-4, this amount being equal to the annual assessment on the said moiety. In special appeal the claim was valued at Rs. 1,500, the alleged value of the estate sought to be recovered.

The Registrar of the High Court, to whom this application for special appeal was presented to be filed after Act XXVI. of 1867 had come into operation, made the following remark :—

“ It appears to me that ‘khoti’ land comes within the terms of the first Special Rule for the Bombay Presidency, Art. 11 of Schedule B of Act XXVI. of 1867. In this view the claim should have been valued at eight times the annual assessment of land revenue payable to Government. As the claim in this case is in my opinion undervalued, the petition should be brought on in court if the special appellant objects to the view I have taken.”

The special appellant having objected, the petition was brought on in court.

PER CURIAM (TUCKER and GIBBS), JJ.:—A khoti estate is an estate paying revenue to Government upon which an assessment is temporarily settled, and a suit for its recovery should, therefore, be assessed at eight times the annual assessment, under Act XXVI. of 1867, Schedule B, Art. 11, note (a), Sp. Rule 1 for the Bombay Presidency. This application must, therefore, be returned to the applicant, who will be at liberty to present it again on the proper stamp, for which purpose a month from the present date is allowed to him.

*Petition rejected.*

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 alias  
 GOPA'L  
 GANESH  
 BIVALKAR.

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March 28.

*Miscellaneous Petition.*

L. R. ASHBURNER, District Magistrate of  
Khán-desh ..... *Petitioner.*  
KESHAV valad TUKU' PA'TI'L et al ..... *Opponents.*

*Judicial Proceeding—Magistrate—Illegal Order—Act XXV. of 1861, Secs. 308—310 and 404—Reg. XII. of 1827, Sec. 19, Cl. 7.*

An order made by a Magistrate under Sec. 308 of Act XXV. of 1861 (Criminal Procedure Code) is not a judicial proceeding within the meaning of Sec. 404 of that Act.

A Magistrate who makes an illegal order, which purports to be made under Sec. 308 of Act XXV. of 1861, but is not made in accordance with the provisions of that section, is liable to be sued in the Civil Court in respect of such order, and to be restrained by injunction from carrying it into effect.

L. R. ASHBURNER, Magistrate of the District of Khán-desh, on the 10th of July 1866, issued an order to Keshav valad Tukú Pátíl, Bhiká valad Bhulá Pátíl, and Dayál valad Tápi Pátíl, of which the following is a translation :—“Know that there is a certain site situated at the aforesaid town, which is part of a public thoroughfare, and which you usurped possession of without authority ; and you have enclosed the site (by building walls around it) for the purpose of collecting manure (*ukirdá*) there. You are hereby directed to remove the walls and to clear the site within two days from the date of this notice, which is given to you under Sec. 308 of the Code of Criminal Procedure. Disobedience of this order will be punished as provided in Sec. 188 of the said Code.”

On the 21st of August 1866, Keshav and Bhiká filed a suit against the Magistrate, and presented a plaint for registration to the Honorable G. A. Hobart, District Judge of Khán-desh : and, after stating that the abovementioned order reached them on or about the 14th of August, and that the site in question was their own ancestral property, applied for an injunction to prevent the Magistrate from removing the walls of the building standing thereon.

The District Judge having granted the injunction, the defendant applied to him to have it set aside, on the ground that his order to the plaintiffs for the removal of the building was an order to remove a nuisance, and that the injunction was in contravention of the defendant's power as Magistrate. An order was thereupon passed by the District Judge, of which the following is a translation:—

“ There is now an objection to admit such an application: as a notice had been issued by this court to stay the execution of the order (issued by the Magistrate). No order, therefore, can be issued upon such an application. You are at liberty to proceed according to law.”

The Magistrate then petitioned the High Court to have the order of the District Judge set aside, by the exercise of its extraordinary powers, on the grounds (1) that the District Judge had not jurisdiction to issue the order for an injunction; (2) that the Judge was wrong in supposing that there was any objection to his setting aside that order, inasmuch as Act VIII. of 1859, Sec. 93, distinctly provides for such a procedure; and (3) that the District Judge's order was illegal, as well as inequitable, since the Magistrate had issued the order complained of for the removal of a nuisance in pursuance of Sec. 308 of Act XXV. of 1861 (Code of Criminal Procedure), which order was final, inasmuch as the plaintiff did not take any steps as required by Chap. xx. of that Act.

*Dhirajlál Mathurádás* (Government Pleader) for the petitioner.

PER CURIAM:—The Judge to report on the course he adopted, especially with reference to the proviso at the end of Sec. 93 of Act VIII. of 1859. Notice to be given to the opposite party.

The District Judge, in his report, stated that he registered the plaint, because it was specially provided in Reg. XII. of 1827, Sec. 19, Cl. 7, that “ any individual deeming himself possessed of a private right, which cannot equitably be interfered with,” may “ file a suit in the Civil Court against

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1867. the Magistrate to support his claim ; and that the reason of his refusing to interfere with the order of injunction was, that the grounds of expediency on which the injunction was granted continued to exist ; and he further observed that the Magistrate's order, though stated to be given under Sec. 308 of Act XXV. of 1861, was a peremptory one, and so not in terms such as Sec. 308 of the Act requires.

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Coram COUCH, C.J., and WARDEN, J.

*Dhirajlál Mathurádás* (Government Pleader), for the petitioner, argued that he came to this court in appeal under the provisions of Act VIII. of 1859, Sec. 94. The order of the Magistrate was in accordance with the provisions of Sec. 308 of the Criminal Procedure Code ; and the plaintiffs ought to have availed themselves of the remedy prescribed in Sec. 310 of the same, and ought not to have gone to the Civil Court.

*Vishvanáth Naráyán Mandlik*, for the opponents, cited 7 Calc. W. Rep. Civ. R. 95, and contended that the order of the Magistrate was not an order under Sec. 308, nor was it in accordance with any law ; and that the court, exercising its powers of extraordinary jurisdiction, might quash the order.

*Cur. adv. vult.*

28th March 1867. COUCH, C.J. :—The Magistrate's order in this case is not a judicial proceeding, and we cannot send for it and cancel it at this stage. If the Magistrate finds he has made an illegal order, he can set himself right by not following it up. Besides, having made one illegal order, he need not go on and make another. It was in the discretion of the Judge to grant an order of injunction, as he has done ; and no cause has been shown for our interfering with that order. If a Magistrate makes an illegal order he is liable to be sued for it.

PER CURIAM :—The petition rejected with costs.

*Miscellaneous Petition.*1867.  
April 25.

BÁ'PUJI JAGJI'VAN ..... *Petitioner.*  
 THE MAGISTRATE OF KHEDA' ..... *Opponent.*

*Judicial Proceedings—Magistrate's Order—Crim. Proc. Code, Sec. 318.*

*Held* that proceedings under Sec. 318 of the Crim. Proc. Code (Act XXV. of 1861) are judicial proceedings within the meaning of Sec. 404 of that Act, and that therefore the High Court has power to interfere with an order passed by a Magistrate under such section.

Under Sec. 318, a Magistrate is bound to inquire who is in actual possession, without regard to the question of who is legally entitled to possession, of the premises in dispute.

THE possession of a piece of land situated at Nariad was disputed between the petitioner and Bái Jethi, who commenced to build upon it. Bái Jethi, on an application made by the petitioner, was forbidden to do so, by an order of the Municipality, until the fact of possession should have been determined by the Magistrate, to whom, as a breach of the peace seemed likely to ensue, the matter was referred.

A. C. Trevor, Subordinate Magistrate of Nariad, gave possession to Bái Jethi, and forbade the petitioner to interfere with her building until he established his right to do so in the Civil Court.

The petitioner prayed for a reversal of the order, on the following among other grounds:—That the Magistrate, without taking any evidence, not even a written statement of the case, as provided for in Sec. 318 of the Criminal Procedure Code, ordered that Bái Jethi might proceed with the work; and that the Magistrate, instead of determining the fact of possession, went into the question of title to the land in dispute.

The petition came on for hearing before NEWTON and WARDEN, JJ.

The records and proceedings in the case having been sent up, and it appearing therefrom that the Magistrate had clearly attempted to determine who was legally entitled to

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 JAGJIVAN possession, instead of determining who was in actual posses-  
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 MAGISTRATE *Dhirajlál Mathurádás* was called on to support the order  
 OF KHEDA. of the Magistrate.

He argued that the order was final, and could not be revised by this court. In fact, as ruled by the court in respect to Magistrates' orders under Secs. 62 and 131 of the Code of Criminal Procedure, this court had no jurisdiction to interfere with orders under Sec. 318, as such orders were not a *judicial proceeding* within the meaning of Sec. 404.

*Shántárám Náráyan*, in reply, urged that proceedings under Sec. 318 were clearly judicial proceedings, inasmuch as although the Magistrate had a limited jurisdiction, still he, as Judge, received evidence, and decided who was in possession, in the same way as Revenue Courts used to do.

NEWTON, J.:—Mr. Dhirajlál has shown no precedent in favour of the position he assumes. It has been repeatedly held by this court that orders under Secs. 62 and 131 are not judicial proceedings, and therefore they are final. But *proceedings* under Sec. 318 are *judicial proceedings*; and it is a fallacy to say that because the jurisdiction of a court is limited to certain points, therefore it is not a judicial proceeding. A Revenue Court, for instance, can decide questions of rent, but not of title, and it would be incorrect to say that the proceedings in such a case were not judicial proceedings. The Magistrate, under Sec. 318, was bound to inquire which party was in actual possession, and he had nothing to do with the question of legal possession. We reverse his decision and pass the following order :—

PER CURIAM :—The Court reverse the order of the F. P. Magistrate, inasmuch as he determined not the actual possession, but the title to possession; and he is ordered, after receiving a written statement, and otherwise conducting the inquiry according to the provisions of Chap. xxii. of the Code of Criminal Procedure, to decide which of the parties is actually in possession, and entitled to retain such possession until ousted by due course of law.

*Special Appeal No. 96 of 1866.*

1867.  
Jan. 31.

RA'DHA'BA'I, widow of RA'MCHANDRA ... *Appellant.*  
SHA'MA', widow of SUNDAR..... *Respondent.*

*Act XIV. of 1859, Sec. 1., Cl. 12 and 15—Limitation—Immoveable Property—Bailment—Depository—Tenancy-at-Will—Adverse Possession—English Law.*

About twenty-five years before suit brought, R. being possessed of a house, allowed K. to occupy it without paying rent, on condition that K. would keep it in repair, and restore it to R. on demand.

Nine years afterwards, and without any demand having been made by R., K. died, and his heirs continued to occupy the house, apparently on the same terms as K. had done.

In a suit brought by R. against the heirs of K. to recover possession of the house, it was held that K. could not be deemed to have been a depositary of the house within the meaning of Sec. 1., Cl. 15, of Act XIV. of 1859, and the case was therefore governed by Sec. 1., Cl. 12, of that Act.

Held also that K. occupied the house as tenant-at-will of R.; that such tenancy was not on the death of K., as of course, converted into an adverse occupation, by the heirs of K., in the absence of proof of the intention of the parties to that effect, and in the absence of anything to show that R. did not assent to the heirs of K. continuing to hold on the same terms as K. had done.

THIS was a Special Appeal from the decision of W. M. Coghlan, Acting Judge at Dhuliá, in Appeal Suit No. 39 of 1865, reversing the decree of the Munsif of Nandurbár, in Original Suit No. 585 of 1864.

The facts of the case, and the grounds of the District Judge's decision, appear from the following extract from the judgment recorded by him:—

“ This action was instituted by Rádhábái, relict of Rámchandra, against the appellant Shámá, and two other persons, Daglú and Zagdú, who have not appealed, to recover possession of a house at Prakásha, on the grounds that the house is her property, and that she had lent it to one Karsandás, now deceased, for his residence, on the condition that he kept it in repair, and would restore it on demand.

“ Rádhábái stated that she demanded restoration of the house some ten or eleven years ago, from Karsandás, and

1867. after his death from his son Sundar, who is also dead : and that they promised to give up the house, but did not do so ; and that she (Rádhábái) had, three years ago, demanded the house from Shámá, Dagdú, and Zagdú ; but that they, although heirs of Karsandás and Sundar, refused to vacate the house.

" Rádhábái stated that the house was given by her to Karsandás as a deposit, and that Sec. 1., Cl. 15, of Act XIV. of 1859 was the provision of the Limitation Act governing the suit.

" Shámá's defence was that the house was not Rádhábái's property, and had not been given by her to Karsandás, deceased, as a deposit, but had been self-acquired by Karsandás fifty years ago, and had been in his family since then. Shámá urged that Rádhábái's statement, that the house was in Karsandás' hands as a deposit, had only been set forth to bring the claim within the Limitation Act.

" Dagdú and Zagdú denied that they had anything to do with the house sued for, partition having taken place between them and their father during their father's lifetime.

" The Munsif gave judgment for Rádhábái, against Shámá only, for the house sued for, with costs, on the grounds that the suit was within the period of legal limitation, which he held to be sixty years, under Act XIV. of 1859, Sec. 1., Cl. 15 ; and that Karsandás, Sundar, and Shámá are shown to have held the house as tenants during Rádhábái's pleasure.

" The Munsif threw out the claim as against Dagdú and Zagdú, on the ground that they were not in possession, and had nothing to do with the house.

" The issues for decision are :—(1) By which section and clause of Act XIV. of 1859 is the suit governed ; (2) did Rádhábái prove that Shámá, and those from whom Shámá holds, held the house as her tenant ; (3) when did Rádhábái's cause of action arise. No other issue is sought by either party.

" My decision on the issues is :—(1) The suit is governed by Act XIV. of 1859, Sec. 1., Cl. 12 ; (2) Rádhábái proved that

Karsandás, the father of Sundar, the husband of Shámá, held the house as her tenant; (3) Rádhábái's cause of action arose at Sundar's death, which occurred more than twelve years ago.

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"It was pleaded by the plaintiff below that she had placed the house in deposit with Karsandás, in such a manner as to bring it under Cl. 15 of Sec. 1. of Act XIV. of 1859, which fixes sixty years as the period of limitation within which a suit for immoveable property may be brought against 'a depositary pawnee, or mortgagee.' The Munsif held that the suit fell within that section, being possibly misled by the very insufficient rendering of the words 'depositary pawnee,' in the Maráthi translation of the Act, by the words 'अमानत घेणारा,' which words merely signify taker of a deposit, and convey no rendering of the word 'pawnee.' I must admit that I have some difficulty in understanding the force of the words 'depositary pawnee' in the Act, since it seems that the word 'pawnee' only would answer the same purpose. In Lord *Holt's* famous judgment in *Coggs v. Bernard* (a), he divided bailments into six classes, the 1st being 'depositum,' or a naked bailment, and the 4th 'vadium,' or pawn. It seems not unlikely that the framers of Act XIV. of 1859 may have had this classification in view when they framed the Act. I, therefore, take property in the possession of a 'depositary pawnee' to be property held as security for a debt, of which the depositary pawnee has the right of sale, but has only the right of appropriating to himself a sum, out of the proceeds of the sale, equal to the sum for which the property was security; and I understand the position of a depositary pawnee to differ from a mortgagee in regard only to the right of appropriating a part only, or the whole, of the proceeds of the property pledged. There is no evidence in this suit to show that there was any element either of pawn or mortgage in the arrangements under which Karsandás came into occupation of the house. I have, therefore, found that Cl. 15 of Sec. 1. does not apply, and that the suit is governed by Sec. 1.,

(a) 2 Ld. Raym. 909.

**1867.** Cl. 12, which assigns a limit of twelve years to suits for recovery of immoveable property.

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SHA'MA'.** "I concur with the Munsif in finding that the parol evidence of the witnesses Nos. 15, 16, 17, 18, 19, 20, 21, 28, 31, &c., is sufficiently strong to warrant the finding that Karsandás, some twenty-five years or more ago, entered into occupation of the house by permission of Rádhábáí. The most difficult question in this case, and one which I feel no assurance of having solved correctly, is, when did Rádhábáí's cause of action arise, that is to say, when did the possession of the house by the defendants become an adverse possession.

"The English Statute of Limitation is very much more minute in expression than Act XIV. of 1859; and the 7th section of the English statute (the Limitation Act of 1833, 3 and 4 William IV., c. 27, sec. 7) lays down that in the case of a tenant-at-will, the tenancy, if not determined sooner, determines at the expiration of a year. The Indian Act is silent on the subject. I have been in doubt as to whether I might take the one-year rule of the English statute as being a reasonable time, and apply it here; or whether, in the absence of any period fixed by law, I should consider the occupation permissive during the lifetime of the tenant, and only adverse after his death. I have adopted the latter course, but not without serious doubt. I am aware of no Indian precedent to guide me. It is consolatory to remember that the English statute, precise as it is, gave rise to an immense body of argument in the case of *Nepean v. Doe* (b), and elicited a great number of contradictory opinions from eminent men on nearly every section.

"My doubt is not, whether I ought to hold the occupancy permissive after Karsandás's death (that is, during Sundar's and Shámá's occupancy), for it is very probable that reasons of a personal nature might cause a proprietor to acquiesce in the occupancy of one tenant, which would not operate in favour of the tenant's heir; nor does the parol agreement, which has been held established, point to a continuance of occupation to heirs. My doubt is whether, on the contrary,

I ought not to consider the occupation adverse from the date of the commencement of Karsandás's tenancy, or from some reasonable time, say a year, afterwards.

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“As it is shown that Karsandás died some sixteen years ago, the effect of my finding that possession since that event has been adverse possession, is to place the suit without the period of twelve years, laid down as the term within which a suit for immoveable property must be brought, by Cl. 12, Sec. 1. of Act XIV. of 1859.

“For the above reasons, I reverse the decree of the Munsif, and throw out the claim with all costs on the respondent.

“*Postscriptum.*—On thinking over this case, I arrived at the conclusion that there must be a misprint in the Act XIV. of 1859, in omitting a comma between ‘depositary’ and ‘pawnee,’ and I now find, on reference to another edition of the Act, that such is the case, and that Sec. 1., Cl. 15, properly runs thus: ‘To suits against a depositary, pawnee, or mortgagee;’ this reading is clear and comprehensible, which the other was not. The section is clearly applicable to a naked bailment of goods, to pawn, and to mortgage.

“The section does not apply to the delivery of the house to Karsandás by Rádhábáí: since the transaction, as set forth in the plaint, was neither a naked bailment of property to be kept for the use of the bailor, nor pawn, nor mortgage, but a letting of the house, repairs to be made in lieu of rent.”

The special appeal came on for hearing this day, before COUCH, C.J., and NEWTON, J.

Nánábháí Haridás, for the appellant, argued that Cl. 15, Sec. 1. of Act XIV. of 1859 applied to this case; and not Cl. 12, Sec. 1., as held by the Judge; that the respondent’s possession, being permissive, never became adverse.

Bhairavanáth Mangesh, for the respondent, contended that Cl. 15, Sec. 1. of Act XIV. of 1859 did not apply to this case. The depositary in that clause meant the depositary of moveable property. The term was not intended to apply to immoveable property. There is a clear finding that Karsandás

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 was a tenant-at-will. His agreement to occupy the house in consideration of his making repairs constituted him such. That tenancy expired at his death, if not before. His son (Sundar) then became tenant by sufferance, and the law of limitation commenced to run against the special appellant : Addison on Contracts, p. 429. Cl. 12, Sec. 1. of Act XIV. of 1859 was applicable to this case. The lower court having distinctly held that since Karsandás' death, defendant's and Sundar's possession for sixteen years was adverse, the claim was barred.

*Cur. adv. vult.*

COUCH, C.J. :—This was a suit by the plaintiff to recover possession of a house which came to be her property, and which she alleged she lent to Karsandás sixteen years ago, on condition of his keeping it in proper repairs, and delivering it back to her on demand. The defendant denied the plaintiff's claim ; and answered that the land was the self-acquired property of Karsandás, and pleaded the law of limitation.

The District Judge, in his judgment, adopts the statement about the manner in which the house was given over to Karsandás by the plaintiff, and the way in which he was to re-deliver it. It may, therefore, be assumed that that was a true statement of the transaction between the parties. The question then arises as to the law of limitation by which this case should be governed.

The Judge, in an elaborate judgment, fell into a mistake in construing Sec. 1., Cl. 15, of Act XIV. of 1859, regarding the words "depositary" and "pawnee," which need not be further alluded to because he corrected it afterwards.

The question to be decided in this case really is, whether Sec. 1., Cl. 15, applies to it or not; that is to say, whether the term *depositary* applies to immoveable property. The term "depositary," in its strictest sense, might apply to both; *i.e.*, there can be a deposit of immoveable as well as of moveable property. In Domat's Civil Law there are several passages (c) which show that the term "depositary" was so understood in the Civil Law.

(c) Domat, Civil Law, Secs. 684-693.

But in England and America the term "depositary" applies to personal or moveable property only, and not to immoveable property. In Story on Bailments, Sec. 51, we find the following :—"In respect to the subject-matter, it (deposit) is in our law limited to personal or moveable property, and is inapplicable to real or immoveable property. The Civil law, and the French law (which follows it), confine the bailment to corporeal property ; and do not admit its application to incorporeal property, such as choses in action and debts. But the title-deeds, or evidences of such debts and credits, *ipsa instrumentorum corpora*, may become the subject of such a bailment. The distinction is nice ; but as the loss of the instrument will entitle the party to a recompence, adequate to the injury done him, it is unimportant in practice. In the common law, and in the Scotch law, debts, choses in action, and other instruments and evidences of debts, may become the subject of a deposit, properly so called." Also in Sec. 141, on the subject of Mandates :—"The contract of mandate, in our law, is (as the common definition imports) confined to mere personal property ; and does not embrace, as it does in the civil law, real property. In general, the civil law makes few distinctions of rights and duties, and remedies between the one species of property and the other. In our law the distinctions are very broad and important in many respects. There is certainly no repugnance to any principle of our law, in considering a gratuitous contract to do an act in respect to real property to be a mandate. It may involve obligations precisely the same as it would in relation to personal property. But the definition of Sir William Jones, above stated, as well as the description of this sort of bailment by Lord Holt in *Coggs v. Bernard*, in which he constantly speaks of goods and chattels, abundantly shows the habit of our law to be, to confine bailments to personal property. In the Civil law a gratuitous engagement to clear out a ditch, or to cultivate or to sell a farm, belonging to the person giving the direction, would be deemed a mandate. In our law it would be treated merely as a special undertaking, without falling under that class of contracts." Then, speaking about gratuitous bailments,

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1867. Sec. 223, he says:—"It follows from the definition above stated that several things are essential to constitute this contract. First, There must be a thing which is lent; and this, according to the civil law, may be either a thing moveable, as a horse, or an immoveable, as a house, or land, or goods, or even a thing incorporeal. But in our law the contract seems confined entirely to goods and chattels, or personal property, and it does not extend to real estate. This is sufficiently apparent from the definition of Lord Holt. It must be a thing lent in contradistinction to a thing deposited, or sold, or intrusted to another for the sole benefit or purposes of the owner."

So that the authorities show that, according to English Law, a depositary is a person charged with the possession of moveable property under certain conditions.

Now Act XIV. of 1859 must be construed with reference to the law of limitation in England, because this Act was intended to apply to cases tried in the Supreme Courts, governed by English law; and was to supersede the law of limitation that prevailed there. Bearing this in mind, we think Sec. 1, Cl. 15, cannot apply to this case.

The contract being of the nature of a tenancy at will, the next question is, when did the cause of action arise, under the circumstances of this case. The District Judge, in considering this point, turned his attention to the present law of limitation in England, and proceeded by analogy to consider that the period of limitation began one year after the tenancy had commenced, or at least from the death of the tenant; and so he held the plaintiff's claim barred. But he overlooked an important distinction between the present English law of limitation and Act XIV. of 1859. It would have been better if the Judge, instead of referring to the present statute of limitation, had referred to the 21 Jac. I., chap. 16.

There is no analogy between the Indian Act and the English law of limitation, under the 3 and 4 Will. IV., chap. 27, the language of which is quite different. The statute 21

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Jac. I., chap. 16, is more like Sec. 1., Cl. 12, of Act XIV. of 1859 ; and the cases decided upon that Act are applicable to this case, such as *Doe v. Hall* (*d*) and *Doe v. Ferrers* (*e*). In the last case it was held that the possession of land after the termination of his lease by the lessee, though he paid no rent, was not adverse, so as to let in the operation of the statute of limitation.

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In consequence of the uncertain nature of a tenancy at will, the Legislature subsequently provided that the right of entry should accrue at the end of one year from the date of the lease. But there is no provision to that effect in the Indian law ; and we are inclined to think that, looking to the habits of the people, and the usages and customs prevalent in this country, it would be wrong to introduce that provision of the English law here. Then, again, the rule of the English law, that a tenancy at will is determined by the death of either of the parties, may not be applicable to India ; and if it is, the agreement in this case may have excluded its operation.

The most important questions in this case are—1st, whether it was the intention of the parties that the tenancy at will should continue after the death of Karsandás ; and 2ndly, assuming that the tenancy was not originally intended to continue beyond the lifetime of Karsandás, did the plaintiff, after his death, do any act fairly leading to the presumption that she consented to the son (Sundar), or the defendant, continuing to occupy the house in the same manner as Karsandás had done.

We reverse the decree of the District Judge ; and remand the case to have the above questions determined, with a direction to the Judge to pass a new decree accordingly ; and we direct the costs to follow the final decision.

*Decree reversed and case remanded.*

(*d*) 2 D. and R. 38.      (*e*) 2 B. and P. 542.

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Aug. 12.*Miscellaneous Appeal No. 2 of 1867.*

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 GOVIND HARI VA'LEKAR ..... *Appellant.*  
 BANK OF INDIA..... *Respondent.*

*Miscellaneous Appeal No. 3 of 1867.*

BANK OF INDIA..... *Appellant.*  
 RA'GHO NA'RAYAN..... *Respondent.*

*Auction Sale—Irregularity—Notice of Sale—Notice of Lien—Adjournment of Sale—Civ. Proc. Code, Sec. 256.*

The inám village of Chandanpuri was sold by auction under a decree. The notice of sale stated that the sale would begin either at Maligám or at Chandanpuri, and be completed at Maligám.

*Held that the notice of sale was sufficiently certain.*

An auctioneer who sells under a decree has power to adjourn the sale from time to time (upon giving proper notice), but whether he does so or not is a matter in his own discretion.

The practice of Kárkúns reading aloud notices of liens on property about to be sold by auction is objectionable, but, in the absence of proof that the value of the property has been thereby deteriorated, it is not such an irregularity as will vitiate the sale.

THESE were two separate appeals against an order of the Honorable G. A. Hobart, District Judge of Khándesh, confirming an auction sale under Sec. 256 of the Civil Procedure Code.

The inám village of Chandanpuri was sold, by order of the District Judge of Khándesh, in execution of a decree obtained by the Bank of India against Govind Hari Válekar, by public auction, for Rs. 7,105.

In the auction notification it was stated that the sale would begin on the 22nd of October, either at Maligám or at Chandanpuri, and be completed at Maligám. The auction commenced on the 22nd of October at Chandanpuri, and that evening the last bid was that of the Bank of India. The auction was then adjourned to the following day at Maligám, where it was closed in the evening, the property being knocked down to Rágho Náráyan as the highest bidder. On that day the Bank of India gave notice to the auc-

tioneer not to close the sale, as they would be prepared to make a higher bid on the next day. The grounds on which the appellants relied appear fully from the judgment of COUCH, C.J.

*Ferguson* (with him *Shántárám Naráyan*) for the appellant.

*Reid* (with him *Dhirajlál Mathurádas*) for the respondent.

COUCH, C.J.:—This is an appeal from an order of the District Judge, confirming a sale made by order of Court in execution of a decree against Govind Hari. The Bank of India and Govind Hari are the petitioners, each asking to have the Judge's order set aside.

The proceedings were taken before the Judge, under Sec. 256, which provides that “no sale of immoveable property shall become absolute until the sale has been confirmed by the Court. At any time within thirty days from the date of the sale, application may be made to the Court to set aside the sale, on the ground of any material irregularity in publishing or conducting the sale, but no sale shall be set aside on the ground of such irregularity, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.”

The counsel for the appellants in Appeal No. 3 argued that the notice of sale was not certain as to the place where the auction was to be held. It appears that the property sold was the village of Chandanpuri, and the notice of sale stated that the sale would begin at either place Maligám, or Chandanpuri, but would be completed at Maligám. There was an advantage in this, as it gave parties an opportunity of seeing the property before the sale was completed at Maligám, and therefore the notification, being in such a form, was not likely to cause any injury to the appellants. I, therefore, think that the uncertainty in the notice of sale was not such an irregularity as to entitle the appellants to have the sale set aside.

The second point taken was that the auction ought to have been closed on the day it commenced. The Bank of India would then have been able to purchase the property

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for a smaller sum than what the respondent paid. There is no rule, I think, which compels an auctioneer to close the auction on the first day. It must be left to his judgment to do so when he thinks fit, and much in such cases will depend upon the nature of the property and the circumstances of the sale. In some cases circumstances may arise such as would make it unjust to limit the power of adjourning the sale with proper notice. There was nothing improper in adjourning the sale in this case.

The third point was that the auction, if adjourned once, could have been also adjourned a second time, in order to enable the manager of the Bank to bid higher and pay the twenty-five per cent. deposit. With reference to this objection, there was no obligation on the part of the auctioneer to adjourn simply because a person sent him notice to say that he was ready to make a higher bid. It would lead to serious mischief, were we to hold that an auctioneer could not close the sale because he received such an offer. It may be, in the present case, that the offer was *bonâ fide*. But we cannot say that the auctioneer was bound to adjourn the sale, inasmuch as he would have to undergo a certain amount of risk in so doing. There was nothing to compel the Bank of India to come forward the next day and bid.

With reference to the fourth objection (that bidders left), it was not shown that the parties likely to bid had left between the last bid and before the sale was completed.

As regards the fifth objection, as to the Kárkún's reading notices of liens on the estate, it would be sufficient that it was not taken before the Judge. From the evidence, however, it appears that the Kárkún did read out notices of liens on the estate; but it has not been shown that any injury resulted from this conduct of the Kárkún, nor can this point now be raised for the first time. In the case we were referred to, the facts were that the Kárkún not only read the notice, but conducted himself in such a way as to lead people to suppose that he made an affirmation of the existence of the mortgage. We did not mean to decide in that case that the mere fact of Kárkún's reading notices was a

material irregularity, so as to invalidate a sale. It would have been better if the Kárkún had not read the notices, for it is possible that that may mislead, and, therefore, it ought to be prevented. In this case, however, it was not such a material irregularity as to reduce the value of the property, and thereby vitiate the sale. These are all the objections taken, and, having disposed of them, we confirm the order of the lower court with costs.

NEWTON, J., concurred.

*Order confirmed.*

*Special Appeal No. 416 of 1867.*

Sept. 16.

NA'RA'YAN VYANKATESH DA'MLE.....*Appellant.*

DHONDU' DA'MODHAR *et al.*.....*Respondents.*

*Boundaries—Jurisdiction—Appeal.*

In a case where *boundaries* of land are disputed (a), an appeal from the Mámlatdár lies to the Collector. A District Judge has no power to entertain such an appeal. Appeal referred to the Collector under Act XVI. of 1838.

THIS was a special appeal from the decision of A. C. Watt, Acting Assistant Judge of the Puná District, in Appeal Suit No. 14 of 1865, confirming the decree of the Mámlatdár of Haveli.

The original suit was to recover certain land, the boundary of which, the plaintiff alleged, was disturbed by the defendants' including a portion of it in their own fields.

The defendants answered that they neither disturbed the boundary, nor included a portion of the plaintiff's fields in their own, as stated by the plaintiff.

The Mámlatdár, on measuring the land, and on referring to the Survey Register, found that the defendants had not included a portion of the plaintiff's land in their own, and decreed in favour of the defendants.

On appeal, the Acting Collector of Puná reversed the decree, and remanded the case for the Mámlatdár to base

(a) See Reg. XVII. of 1827, Sec. xxxi., Cl. 5, and Act II. of 1866, Sec. iii.

1807.  
GOVIND H.  
VA'LEKAR  
v.  
BANK OF  
INDIA.  
BANK OF  
INDIA  
v.  
RA'GHO  
NA'BA'YA'N.

1867.

NA'RÁYAN  
V. DA'MLE

v.

DHONDU'  
DA'MODHAR  
*et al.*

his decision on the village map, which had not been referred to at all.

The plaintiff's claim was again thrown out by the Mám-latdár.

On appeal, the Acting Assistant Judge confirmed the decree of the Mám-latdar.

The special appeal was argued before COUCH, C.J., and NEWTON, J.

*Bhairavanáth Mangesh*, for the appellant:—The Acting Assistant Judge had no jurisdiction in this case, which referred to boundary disputes, as boundary disputes have been excluded from the jurisdiction of Civil Courts by (Bombay) Act Nô. II. of 1866. In this case the appeal was, in the first instance, presented to the Collector, and it was that officer who referred it to the Judge. Even if the appellant himself had voluntarily appealed to the Judge, still, as consent of parties does not confer jurisdiction, the Judge would have had no right to hear the appeal.

*Dhirajlál Mathurádás*, for the respondent, admitted that he could not support the decree, and said that, under Act XVI. of 1838, the Court could annul the decree, and refer it to the Collector.

COUCH, C.J. :—We must annul the decree ; and refer the appeal to the Collector to be heard by him. Each party to bear his own costs in appeal.

*Decree annulled.*

*Special Appeal No. 389 of 1867.*

1867.  
Nov. 18.

GANE BHIVE PARAB *et al.* .... *Appellants.*

KANE BHIVE *et al.* .... *Respondents.*

*Hindú Law—Separate Property—Undivided Family—Onus Probandi.*

By Hindú law the burden of showing of what separate property consists lies upon the person who alleges the property to be separate.

A person lending money on the security of the property of an undivided Hindú family is bound to make inquiries as to the necessity that exists for such loan. If he lends the money after reasonable inquiry, and *bona fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors.

Authorities bearing on the question of the *onus probandi* in such cases cited.

THIS was a Special Appeal from the decision of C. B. Izon, Joint Judge at Ratnágirí, in Appeal Suit No. 297 of 1866, affirming the decree of the Munsif of Vengurlá.

The Special Appeal was argued before COUCH, C.J., and NEWTON, J.

*Bhairavánáth Mangesh* for the appellant.

*Dhirajlál Mathurádás* for the respondent.

The facts of the case, so far as material, appear from the following judgment, delivered by

COUCH, C. J.:—This was a suit for the partition of a family estate, formerly of Bhive, the father of the plaintiffs, the defendant Gane being his eldest son, the defendant Thake a claimant of part of the property, and the defendant Bápu a mortgagee from Gane. Two questions were raised: (1) whether the estate of Bhive consisted of seven *thíkáns*, or only of the half of four as was alleged by the defendant Thake; and (2) whether the plaintiffs were chargeable with the amount of the mortgage to Bápu.

Upon the first of these the Joint Judge says: “On the first point the only evidence that all seven *thíkáns* belong to the separate kháte of Bhive, consists of the *zapta* of 1817 (exhibit 42) and the accounts (exhibit 80). The names of the

1867. fields are not given in the mortgage bond by Gane to Ganeshám (exhibit 11), but there is no manner of doubt that Bhive's sons have a separate kháte (63 Thako's deposition, exhibit 14). Considering that there is no evidence that only half of four fields constitutes Bhive's kháte, I find the evidence referred to (exhibits 42 &c.) sufficiently proves that all seven *thikáns* are included."

This reasoning appears to us to be erroneous. The Joint Judge has not borne in his mind that the onus of showing of what the separate property consisted lay upon the plaintiffs; and if the affirmative evidence was not sufficient to satisfy him that all seven *thikáns* belonged to it, he ought not to have found that they did, because there was no evidence that it was only half of four fields. The suit must be remanded for a reconsideration of the evidence upon this question.

Upon the second question the facts were that Bhive mortgaged his estate in 1836, and after his death, the mortgagee having brought a suit and obtained a decree, Gane, the eldest son and manager of the family, for the purpose of satisfying the claim, made a fresh mortgage (exhibit 11), and subsequently made a third mortgage to the defendant Bápú for a larger sum, part of which was said to have been applied in payment of the second mortgage. The Joint Judge says— "I agree with the lower court that the only debt with which the plaintiffs are chargeable is the debt of the father as shown in the bond (exhibit 11). I find the mortgage to Bápú not binding on them."

Here also we think the Judge was in error, and that he has not considered the question properly. He gives no reason for his opinion. Probably if he had attempted to do so, and had for that purpose examined into the state of the law on the point, he would have perceived his error. As this question will have to be again determined when the suit comes on for re-trial, it is right that the law applicable to it should be now stated. In *Govind Luxumon v. Sukharam Rajashet*, S. A. No. 4338 of 1861 (*a*), Govind sued for the

(a) S Harrington 159.

removal of an attachment from a half-share, to which, he urged, he was entitled, of certain properties which Sakháram, having obtained a decree against Viñhobá Angria, had proceeded to attach after the death of that individual. Sakháram answered that Govind and Viñhobá lived as an undivided family, and were jointly liable for the money borrowed from him. On appeal from the Munsif of Alibág, the Judge held that, since the respondent Govind did not show that the alleged transaction was purely personal to Viñhobá, who was then in charge of the estate, and although he was only a half-brother of Viñhobá, it must be held, as regards the claim of third parties being creditors, that Viñhobá was acting in his representative capacity until the opposite was established by the party claiming to interfere. On special appeal to the late Šadr Diváni Adálat, on the ground that the onus of proving that the debt was incurred for the benefit of the family should have been thrown on the defendant, the court held the passage referred to in Strange's Hindú Law (page 200), to the effect that creditors "at their peril must see in such a case that the transaction be one by which the rest of the co-heirs will be concluded," only to mean that persons lending to a member of an undivided family must take care that the transactions be entered into under such circumstances as would at the time justify them in considering that the borrower, being otherwise competent to act as the representative of the family, would lay out the money for the family's good, and not to require that the lender should ascertain the manner in which the money might subsequently be expended.

It has been held by this court, in a suit to recover possession of a house mortgaged by the manager of an undivided Hindú family where one of the members of it was a minor, that if the plaintiff, after reasonable inquiry, did in good faith believe that the mortgagor was manager, and wanted the money for family purposes, he would be entitled to recover, and that the onus of proving this was on the plaintiff: *Trimback Anant v. Gopalshet* (b); and there is a decision of the

(b) 1 Bom. H. C. Rep. 27.

1807.  
GANE BHIVE  
et al.  
v.  
KANE  
BHIVE  
et al.

1807.  
 GANE BHIVE  
*et al.*  
 v.  
 KANE BHIVE  
*et al.*

High Court of Madras, *Tandavaraya Mudale v. Valli Amai (c)*, that when one of the members of a Hindú family is a minor, the creditor seeking to enforce his claim against the family property must show that the debt was contracted *bonâ fide* and for the benefit of the family. In *Nouruttun Kover v. Gooree Dutt Sing (d)*, Sir Barnes Peacock and Mr. Justice Jackson held, in a case as to Hindú joint family property, that "although it may not be necessary for the lender of money upon *zur-i-pesgee* (mortgage), or for the purchaser of an estate which is actually sold, to see to the application of the purchase-money, still it is necessary for him to make due inquiry as to the necessity to borrow or sell ; that if the necessity existed, or if the purchaser from inquiries *bonâ fide* made was led to believe that a necessity to sell existed, the sale would not be invalidated by the sellers failing to apply the money properly." Concurring in these decisions, we consider that the question to be determined by the lower court in the present case is, whether the defendant Bápú advanced the money, for which the mortgage to him was executed, *bonâ fide*, and believing, after making reasonable inquiries, that it was required for the support or other necessary expenses of the family. If he did so, it is a good charge upon the entire property.

With regard to the onus of proof in the present case, the Judicial Committee of the Privy Council have said, in *Hanoomanpursaud Panday v. Mussumat Babooe Munraj Koonweree (e)*, that the question on whom does the onus of proof lie in such suits is one not capable of a general and inflexible answer : "the presumption proper to be made will vary with circumstances, and must be regulated by and dependent on them. Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour, made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the

(e) 6 Moor. Ind. App. 419. (c) 1 Mad. H. C. Rep. 398.

(d) 6 Calc. W. Rep., Civ. R. 193.

representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan." "The case before their Lordships is one of a mixed character ; the existing security represents loans and transactions at various times and under varying circumstances ; it is a consolidating security ; and as to part, at least, namely, the ancestral debt, there is, in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's (the mortgagee's) favour of a consideration that binds the estate." These observations are, in our opinion, as applicable where all the members of the family are adults as where one of them is an infant. The lower court, in determining the question now put before it, should be governed by these remarks, and should receive any further evidence which either of the parties may desire to give.

1867.  
GANE BHIVE  
et al.  
v.  
KANE BHIVE  
et al.

*Decree reversed and suit remanded.*

*Special Appeal No. 539 of 1867.*

Nov. 20.

RATANSHANKAR REVA'SHANKAR ..... *Appellant.*  
GULA'B SHANKAR LA'L SHANKAR ..... *Respondent.*

*Jurisdiction—Varshásan—Gáikwád—Title—Small Cause Court—Extra-ordinary Jurisdiction.*

In an action brought to recover a third-share of *arrears* of a *varshásan*, or annual allowance, paid by the Gáikwád of Barodá to the defendant, and in which the plaintiff alleged that he was entitled to a third-share :

*Held* that such an action can be maintained in a Munsif's Court, although it may be necessary to determine the title of the plaintiff to share in such *varshásan*.

*Sembé* that such an action is maintainable in a Court of Small Causes.

Where the District Judge reversed the decree of the Munsif *for want of jurisdiction*, although the amount of the claim was under Rs. 500, the Court, in the exercise of its extraordinary jurisdiction, interfered.

THIS was a special appeal against the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit No. 74 of 1867, reversing the decree of the Munsif of Súrat.

The original suit was brought to recover arrears of a third-share of a *varshásan*, or annual allowance, collected for six years by the defendant.

1867.

RATANSHAN-  
KAR REVA'-  
SHANKAR  
v.  
GULABSHAN-  
KAR LA'LSHAN-  
KAR.

The defendant answered, *inter alia*, that the allowance was paid by a foreign power (the Gáikwád of Barodá), and could not be claimed in this court, and that, even if the *varshásan* be claimable, he had another claim against the plaintiff in respect of expenses incurred for another member of his family.

Upon appeal the District Judge recorded as follows :—

“The appellant’s principal ground of objection against the decree passed against him is, that it was not competent to our courts to decide upon a *varshásan* allowance granted by the Gáikwád, and paid in the Gáikwád’s territory ; and it appears to me that this is a valid objection. The respondent admits that the *hak* is receivable from the Gáikwád, but argues that this action is not to establish his right to a portion of the *hak* as against his relative, but simply to recover arrears of his money, withheld by the appellant. But the action is virtually to try the right to the *hak* in question—a right which a foreign court is not competent to adjudicate on ; for, assuming that the respondent’s statement is correct, and that he merely sues to recover money ‘had and received to his use,’ it is impossible to decide the question without determining also the question of title.

“I consider the decision of the lower court was wrong for want of jurisdiction ; and therefore reverse the decree with costs.”

The grounds of objection taken in Special Appeal were—that it was contrary to law: in that (1) the Judge was wrong in holding that the court had no jurisdiction ; and (2) the decision was opposed to the High Court’s ruling in Special Appeal No. 63 of 1867.

The case was heard before COUCH, C.J., and NEWTON, J.

*Nánábhái Haridás* :—There is no jurisdiction here, as it is a suit cognisable by a Small Cause Court. It is simply an action for debt ; and, under Sec. 27 of Act XXIII. of 1861, whether the Judge has gone into the question of title or not, this court has no jurisdiction.

*Bhairavanáth Mangesh* (with him *Dhirajlál Máthurádás*) :—The Judge has gone into the question of the title. It has

been held (a) that where the question of title incidentally comes in, this court has jurisdiction.

*Nánábhái*, in reply :—Looking at it as a case of money had and received, the judgment cannot be supported, as the property (*varshásan*) is situated at Barodá, where the court had no jurisdiction. [COUCH, C.J. :—The question is, whether the money was received by the defendant on his own account or for others.] As no special appeal lies, the proper course is to dismiss the special appeal, and leave the party to apply for a review of judgment.

COUCH, C.J. :—The question to be determined was, whether the money which had been received by the defendant from the Gáikwád had been received on the plaintiff's account. If, in determining it, it became necessary incidentally to try the question of title to the money, that would not deprive the court of jurisdiction.

The Judge, therefore, was wrong in holding that the Munsif had no jurisdiction; and, as this is a question of jurisdiction, the Court thinks that, although no special appeal lies to this court (under Sec. 27 [b] of Act XXIII. of 1861), it should exercise its extraordinary power, and correct the error.

*Case remanded.*

(a) *Díkshit v. Díkshit*, 2 Bom. H. C. Rep. 4.

(b) “No special appeal shall lie from any decision or order which shall be passed on regular appeal after the passing of this Act by any Court subordinate to the Sadr Court, in any suit of the nature cognisable in Courts of Small Causes under Act XI. of 1865 (for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts of Judicature established by Royal Charter), when the debt, damage, or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final.”

1867.  
RATANSHAN-  
KAR REVA-  
SHANKAR  
v.  
GULABSHAN-  
KAR LA'LSHAN-  
KAR.

1867.  
Dec. 5.*Referred Case.*

**AMI'RCHAND JAMNA'DA'S** ..... *Plaintiff.*  
**MAGGAN AMTHU'** ..... *Defendant.*

*Hearing of Suit—Commencement of Suit—Stamp Duty Refund—Act X. of 1862, Sec. 26.*

*Held* that for the purpose of refund of half stamp duty under Sec. 26 of Act X. of 1862, the hearing of a suit in a Small Cause Court commences when proof of the service of the summons is taken on the day appointed for the hearing; and where proof of the service of the summons has been previously taken, it must be considered as taken at the commencement of the proceedings on the day appointed for hearing.

**QUESTION** submitted for the opinion of the High Court by Gopálráv Hari Deshmukh, Judge of the Small Cause Court at Ahmedábád :—

“Whether or not the hearing of a case should be considered to have commenced, for the purpose of refusing or granting a certificate for the refund of stamp duty, when a party, by application to the court, gets his case postponed on the day on which it is set down for final disposal, the application being either before or after the proof of the service of the summons has been recorded.

“On the day of hearing, the proof of the service of the summons was taken, and then the plaintiff stated that an amicable settlement was set on foot, and that the result would be known in two days. The case was, therefore, postponed for two days, at the end of which time the plaintiff stated that the claim was settled, and applied to have it withdrawn. He was allowed to do so, when he raised the question of giving him a certificate for the refund of half the stamp duty paid by him on the plaint. He argued that the hearing was postponed at his request, made after the proof of the service of the summons had been recorded, but that his request was not the commencement of the hearing of the suit, which properly begins with the defendant's answer, and that the recording of the proof of the service of summons was also not the hearing, because it could be taken on any day after the service, for the convenience of the bailiff, under

the Circular Order of the High Court No. 1073 dated 17th July 1867."

PER CURIAM (COUCH, C. J., and NEWTON, J.) :—The hearing of the suit must be considered to have commenced when proof of the service of the summons has been taken on the day appointed for the hearing ; and where, under the Circular Order of the High Court No. 1073 dated 17th July 1867, proof of the service has been previously taken, it must be considered as if it had not been taken until the commencement of proceedings in the case on the day appointed for hearing.

1867.  
AMERCHAND  
JAMNA'DA'S  
v.  
MAGGAN  
AMTHU'.

NOTE.—Sec. 26 of Act X. of 1862 :—“ In modification of so much of Sec. 98 of the Code of Civil Procedure as declares that on the application of the plaintiff, reciting the substance of any agreement, compromise, or satisfaction, in accordance with which a suit is adjusted and disposed of, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorising him to receive back from the Collector the full amount of stamp duty paid on the plaint, if the application shall have been presented before the settlement of issues, or half the amount if presented at any time after the settlement of issues before any witness has been examined,—it is enacted that if such application shall have been presented before the suit is called up for the settlement of issues, or in suits in which the summons to the defendant shall be for the final disposal of the suit, as directed in Sec. 41 of the said Code, and in Sec. 9 of Act XLII. of 1860 (*for the establishment of Courts of Small Causes beyond the local limits of the jurisdiction of the Supreme Courts established by Royal Charter*), before the hearing of the suit has commenced, the Court, if satisfied that such agreement, compromise, or satisfaction has been actually entered into or made, shall grant a certificate to the plaintiff authorising him to receive back from the Collector half the amount of stamp duty paid on the plaint. Provided that no such certificate shall be granted if the adjustment between the parties be such as to require a decree to pass, on which process of execution can be taken out, or in any appealed suit.

1867.  
July 29.*Special Appeal No. 248 of 1867.*

SHRI'PAT RA'MCHANDRA KULKARNI' .....*Appellant.*  
 VITHOJI valad MALHA'RJI PA'TI'L et al. *Respondents.*

*Reg. VIII. of 1827—Certificate of Heirship—Evidence.*

A certificate of heirship granted under Reg. VIII. of 1827 is not *prima facie* evidence that the holder of it is the rightful heir of the deceased. The effect of such certificate is merely to give security to persons in possession of or indebted to the estate of the deceased in dealing with such holder as the legal representative of the deceased.

THIS was a special appeal from the decision of A. C. Watt,  
 Acting Assistant Judge of Puná, in Appeal Suit No. 194 of 1864, reversing the decree of the Munsif of Junnar.

Dharmáji and Sokáji possessed some *mirás* lands in the village of Giroli. On their death one Bápúji was put up as their heir by Vamanáji Rámchandra and Shípat Rámchandra. They claimed to have acquired possession of the land in question from the said Bápúji, and obstructed the special respondents, who claimed the same land through Tulsábáí, who had obtained a certificate of heirship to the aforesaid Dharmáji and Sokáji.

The Munsif threw out the claim of the plaintiffs as not proved, but on appeal the Acting Assistant Judge held the claim proved. After discussing other evidence in the case, he observed as follows:—

“There is then the receipt book (exhibit No. 34); and that the part of it in which payments are said to have been made by Bápúji valad Dharmáji is false, there can, I think, be no doubt. The book, which purports to be one book, is sealed with different seals, fresh leaves have been taken out of some other book and added to it, and it is plain to see that the book has been tampered with.

“Now this defendant Vamanáji being the Kulkarní, nothing could be easier for him to do than to make up this book. The other evidence for the defendant is a letter from the Mánlatdár of Pábal to the Murbád Mánlatdár of

Tháñá Zillá dated January 1859, in which he says that Tulsábáí had married again; and the conclusion is that, as this was four months before the varaspatra, this deed could not have been executed, as Tulsábáí after her second marriage would not have had authority to execute it. The Mámlatdár's report (exhibit No. 70) does not, however, I think, prove this, as he might be acting only on what he was told. Now the appellants adduce the following evidence:—  
 1st, The varaspatra No. 2, which is dated April 26th, 1859, and this is proved by witnesses Nos. 25, 26, 27, and 28, who also state that, at the time this deed was written, Tulsábáí had not married again. There is then the exhibit No. 3, the certificate of heirship, which Tulsábáí got, to Dharmáji and Sokáji, dated August 1859. Now, although this certificate does not prove that Tulsábáí was the heir to these people, still it shows that at that time she proved *prima facie* to the Court that she was."

The case was argued before COUCH, C.J., and NEWTON, J.

*Dhirajlál Mathurádás* for the appellant.

*Shántárám Náráyan* for the respondents.

COUCH, C. J.:—In this case the Judge below has treated a certificate of heirship, under Reg. VIII. of 1827, as *prima facie* evidence that Tulsábáí, under whom the plaintiffs claim, was heir of Dharmáji and Sokáji. The question before us is whether he was right in doing so. The regulation says in the preamble: "Whereas, at the same time that it is in general desirable that the heirs, executors, or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management, or *suo* for the recovery, of property belonging to the estate, without the interference of courts of justice, it is yet in some cases necessary or convenient that such heirs, executors, or administrators, in order to give confidence to persons in possession of, or indebted to, the estate to acknowledge and deal with them, should obtain a certificate of heirship, executorship, or administratorship from the Zillá Court." And further on—"And whereas, whenever there is no person on the spot entitled or willing to take charge of the

1867.

SHRI'PAT R.  
KULKARNI'

v.

VITHOJI  
M. PAT'L  
et al.

1867.

SHRI'PAT R.  
KULKARNI'v.  
VITHOJI  
M. PA'TI'L  
*et al.*

property of a person deceased, or, when the right of succession is disputed between two or more claimants none of whom has taken possession, or where the heirs are incompetent to the management of their affairs and have no near relations entitled and willing to take charge on their behalf, or where a person possessed of property dies intestate and without known heirs, it is essential that the Zillá Court should appoint an administrator for the management of the estate."

The object of the regulation being thus stated, the first section provides that the party who is the heir may assume the right to, and may enter upon, the management of the property. But if he wishes other persons to be safe in paying to him the debts of the deceased, he can effect this only by suit; the particular procedure to be followed is then laid down in the subsequent sections; the object of the whole being to give security to persons in possession of, or indebted to, the estate of the deceased to acknowledge and deal with him as the representative of the deceased.

Then we come to Sec. 7, which distinctly provides—  
*First*, “An heir, executor, or administrator, holding the proper certificate, may do all acts and grant all deeds competent to a legal heir, executor, or administrator, and may sue and obtain judgment in any court in that capacity;”  
*Secondly*, “But as the certificate confers no right to the property, but only indicates the person who, for the time being, is in the legal management thereof, the granting of such certificate shall not finally determine nor injure the rights of any person, and the certificate shall be annulled by the Zillá Court upon proof that another person has a preferable right.” All this shows clearly that it was not intended to do more by this certificate of heirship than to permit debtors to pay their debts, and others who had the possession of estates to give up the possession to the representative of the deceased, and relieve themselves from further liabilities.

There is some difference between this regulation and Act XXVII. of 1860; but the ground on which Sir Barnes Peacock bases his judgment in *Sevinthia Pillay v. Mootoosawmy*

and another (b) is, that a Hindú widow, as holder of a certificate under Act XXVII. of 1860, is not necessarily the proper person to continue a suit for the recovery of immoveable property; though she is entitled to do so as heir of the deceased if he died without issue and was the sole owner of the property. We hold, therefore, that the Judge was wrong in treating the certificate as *prima facie* evidence.

This being the only ground taken before us, we reverse the decree of the lower court, and remand the case for re-trial with reference to what is stated above. Costs to follow the final decision.

*Decree reversed and suit remanded.*

b) 8 Calc. W. R., C. R. 2.



*Civil Petition.*

Dec. 10.

RA'DHABA'I, widow of DA'MODHAR ..... *Petitioner.*

RA'DHABA'I, widow of KRISHNANA'TH... *Opponent.*

*Mesne Profits—Immoveable Property—Execution of Decree—Act XXIII. of 1861, Sec. 11.*

Where a decree awarding possession of immoveable property is silent as to mesne profits accruing between the filing of the plaint and the execution of the decree, the Court executing the decree has no power to award such; the proper course for the plaintiff to adopt under such circumstances is to apply to the Court which passed the decree for a review, or else to file a separate suit.

*Sirá Pátil Rahimná v. Malukji Mán Nathuná (a) overruled.*

THIS was an application for the reversal of an order passed in appeal by R. W. Hunter, Acting Assistant Judge of Solápur, in the matter of the execution of a decree.

The facts appear from the following judgment of the Acting Assistant Judge:—

“The original plaintiff sued the defendant and two others to recover possession of a field, and obtained a decree accordingly. The decree made no provision for mesne profits or rent from the date of the suit until the date of delivery of possession to the plaintiff.

• (a) 3 Bom. H. C. Rep., A. C. J. 31.

1867.  
SHRI TAT R.  
KULKARNI  
v.  
VITHOJI  
M. P'ATI'L  
et al.

1867.  
RA'DHA'BA'I  
v.  
RA'DHA'BA'I.

"The plaintiff, therefore, brought a separate suit for mesne profits during the above period. The late Sadr Amín, whose decision was confirmed in appeal by the Joint Judge, held that the suit was barred by Sec. 11 of Act XXIII. of 1861, the claim being determinable at the time of execution.

"At the time of execution, the plaintiff prayed the present Sadr Amín (the court executing the decree) to allow her mesne profits as above.

"The Sadr Amín was of opinion that, as no provision was made in the decree for such profits, the plaintiff's sole remedy lay in a separate suit; but, as a separate suit had been brought, and as the Joint Judge had determined that such profits could be allowed at the time of execution, the Sadr Amín felt he had no alternative but to dispose of the claim summarily, as the only remedy that remained available to the plaintiff. Under this view, he determined that the plaintiff was entitled to mesne profits during the above period, and decided that the appellant should pay her on that account Rs. 246 and costs.

"The present appeal is from that decision.

"The petition of appeal contains four clauses, of which the first is—that, as in the plaintiff's decree for possession no provision was made for the payment of mesne profit from the date of suit till the date of delivery of possession, to allow such profits was opposed to Sec. 11 of Act XXIII. of 1861.

"The first question to be determined is, whether this objection is sustained.

"I am of opinion that when the law has provided a certain means whereby a particular right may be secured, the person claiming such right must seek it by such means, and by such only. It is open to a plaintiff who sues for land to ask the court to provide in its decree, for payment of mesne profits from the date of suit, under Sec. 196 of Act VIII. of 1859; and I am inclined to think that if a plaintiff neglects to do so, he has no other remedy. I concur with the Sadr Amín that the question is not, under the circumstances stated, determinable by the court executing the decree, for

such court has only ministerial duties to perform. It is both proper and convenient that it should determine the *amount* of mesne profits that may be payable under the decree, but it would be improper for it to determine the *title* to such. If, therefore, no title to mesne profits is declared in the decree for possession, I think the court executing the decree cannot go beyond the decree itself, and has in that case nothing whatever to do with the amount of such profits. \* \* \*

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“ In the present instance, as in the plaintiff's decree for possession, no provision was made for the payment of mesne profits from the date of the suit. I think no such profits should have been allowed her.

“ I, therefore, reverse the Sadr Amín's order appealed against. All costs on the respondent.”

The case was argued before COUCH, C.J., NEWTON, TUCKER, WARDEN, and GIBBS, JJ.

*Nánábhái Harídás*, for the petitioner :—This court has held that whether the decree awards mesne profits or not, they can be claimed at the time of the execution of the decree: *Jivá Pútil Rahimná v. Málúkji Marú Nathuná* (b). The Madras High Court has likewise ruled that, even with the permission of the court, a separate suit for mesne profits will not lie: *Chennapa Náyudu v. Pitchi Reddi and others* (c). See too *Baboo Issur Dutt Singh and others v. Alluck Misser and others* (d); and in the case of *Hookum Bilee v. Mahomed Moosa Khan and others* (e) it was held that mesne profits for the period during which the decree-holder was executing the decree, and kept out of possession by the opposite party, might be awarded by the court executing the decree, under Sec. 11 of Act XXIII. of 1861.

[COUCH, C.J.:—The miscellaneous rulings in *Huronath Roy v. Indoo Bhoosun Deb Roy* (f), and in *Mosoodun Lal v. Bheckaree Singh* (g), are to the contrary, and they overrule the other decisions.]

(b) 3 Bonn. H. C. Rep., A. C. J. 31. (c) 1 Mad. H. C. Rep. 453.  
 (d) 7 Calc. W. Rep., Civ. R. 129. (e) 6 Calc. W. Rep., Mis. Ap. 13.  
 (f) 6 Calc. W. Rep., Mis. Ap. 33. (g) 6 Calc. W. Rep., Mis. Ap. 109.

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It is quite sufficient that the rulings of the Madras and Bombay courts are in my favour. In the present case, instead of having recourse to a review of judgment, my client, as he was advised by the lower court, appealed. There can now be no review of the original decree, as there has been an appeal.

[COUCH, C. J. :—It is an omission in the decree. Can you point out any case in which the omission was supplied by the court executing the decree ?]

*Dhirajlil Mathurádás* :—The proper course for the plaintiff to have adopted was to get the decree reviewed, and then apply for its execution. The court executing the decree has to perform ministerial duties only, and the later Calcutta decisions are decisive upon the point. He cited *Gour Kishen Singh v. Fuker Chund* (h).

*Cur. adv. vult.*

COUCH, C. J. :—The question in this case is whether Sec. 11 of Act XXIII. of 1861 empowers the court executing a decree to award mesne profits. There are conflicting decisions, and the Act leaves the matter questionable. This court has held that a separate suit does not lie, and that the court executing the decree can award mesne profits. The Madras High Court is of the same opinion, but not the Calcutta High Court. I concur with the Calcutta High Court, for the reasons given by Sir Barnes Peacock. Sec. 196 of Act VIII. of 1859 should be compared with Sec. 11 of Act XXIII. of 1861 ; and taking these two sections together it appears to me that the term “payable” means payable, or liable to be paid, by virtue of a decree ; and it does not mean recoverable by law. When a person is entitled to land, it does not follow that all the defendants are liable for the mesne profits. Many persons may be defendants who were never in possession and who never received the profits. The court making the decree is the proper court to determine who is liable. The High Court at Calcutta allowed a separate suit to be entertained for *mesne profits* under circumstances similar to these.

(h) 7 Calc. W. Rep., Civ. R. 364.

The party cannot come to this court for execution. The petitioner, no doubt, is in a position of hardship, her suit having been rejected ; still a review of the decree of the District Judge can be made, as the matter has not come before this court.

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NEWTON, J. :—Sec. 11 provides only that questions as to *amount* shall be determined by order of the court executing the decree ; questions as to *title* cannot be so determined. The word “payable” can apply only where mesne profits have been made payable by the decree. Sec. 11 of Act XXIII. of 1861 puts interest in the same position as mesne profits. It is not argued that a court executing a decree can give interest when the right to interest has not been determined in that decree.

TUCKER, J. :—As one of the Judges who are responsible for the decision of this court in the case of *Jivá Pátíl Rahimná v. Málukíj Marú*, it becomes my duty to state that, after hearing the arguments which have been urged against that decision, and after considering the judgment of a Full Bench of the High Court at Calcutta on this point which has been referred to by the Chief Justice, I have come to the conclusion that the interpretation which my brother Warden and I placed upon the words “*payable in respect of the subject-matter of a suit between the date of the suit and execution of the decree*” in Sec. 11 of Act XXIII. of 1861 was incorrect.

It was originally my opinion that the Legislature had intended to declare that in all suits in which the right to the possession of land had been decreed, mesne profits would be necessarily recoverable or “*payable*” for the time which intervened between the date of the institution of the suit and the date of the execution of the decree ; but on a further consideration of Secs. 10, 196, and 197 of the Civil Procedure Code, and on reading those sections together with Sec. 11 of Act XXIII. of 1861, I feel constrained to admit that the language used does not support this wide construction of the word “*payable*,” and that the more limited signification

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 the law.

I now hold that it is only when mesne profits have been declared payable by a decree, that the court executing that decree can determine the amount which may be due on this account between the date of suit and the date of the execution of the decree, and that the prohibition to bring a fresh suit for the recovery of such mesne profits applies only to cases in which the right has been declared in a previous suit, and that, consequently, when there has been no such declaration, a new suit may be maintained.

I regret extremely that I should have taken a view of the law which I now find to have been mistaken, and I shall be willing to admit a review of the decision in Special Appeal No. 673 of 1865 which will now be overruled, or of any other decision in which I have taken part and in which a similar doctrine has been upheld.

WARDEN, J.:—I also, as one of the Judges who was a party to the cases that have been referred to to-day, feel myself called on to say that I concur in the observations of my brother Tucker, and that I also acquiesce in the views which have been expressed by the Chief Justice.

GIBBS, J.:—I have only to say that I entirely concur with what has been said by the Chief Justice. My opinion has always been in accordance with that which will now be decided to be the ruling of this court.

*Petition rejected, each party to pay his own costs.*

*Referred Case.*1867.  
Dec. 20.SHA'PURJI JEHA'NGIR.....*Plaintiff.*RICHARD MORGAN .....*Defendant.*

*Cantonment Magistrate—Small Cause Court—Concurrent Jurisdiction—European British Subject—Act III. of 1859, Sec. 1—Act XI. of 1865, Sec. 8.*

A European British subject, not belonging to or connected with the army, who resides within a Cantonment, is amenable to the jurisdiction of a Cantonment Joint Magistrate, under Sec. 1 of Act III. of 1859.

Where a pleader resides within the limits of a cantonment and practises as a pleader within the jurisdiction of a Small Cause Court, both the Cantonment Magistrate and the Small Cause Court Judge have concurrent jurisdiction over him to the amounts respectively cognisable by them.

CASE referred for the opinion of the High Court by Ráv Bahádúr Janárdhan Vásudevji, Judge of the Small Cause Court at Puná, under Sec. 22 of Act XI. of 1865.

“Shápurji Jehángir sued one Richard Morgan for the payment of Rs. 34-11-0, for goods supplied.

“The defendant pleaded ‘no jurisdiction,’ he being a resident of the Puná Cantonment, and the claim being one cognisable by the Cantonment Joint Magistrate. He relied upon Sec. 1 of Act III. of 1859 and Sec. 12 of Act XI. of 1865.

“The plaintiff admits that the defendant is a resident of the Cantonment, but contends that Act III. of 1859 does not invest the Cantonment Joint Magistrate with any jurisdiction over Europeans, but over natives only, and that the defendant being a European, his residence within the limits of the Cantonment does not render him amenable to the authority of the Cantonment Joint Magistrate. The plaintiff further urges that the defendant practises as a pleader in the courts in the City of Puná, which is beyond the local limits of the Cantonment Magistrate’s jurisdiction, and within those of this court, and that this court has jurisdiction, under Sec. 8 of Act XI. of 1865, over persons “*personally working for gain or carrying on business within the local limits of its jurisdiction.*”

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"The defendant replies that, the office of pleader being a profession, his practising as pleader in the courts of the City of Puná does not come within the meaning of the phrases 'personally working for gain' and 'carrying on business.'

"The contention between the parties resolves itself into the following three questions:—

"I. Whether a European not belonging to or connected with the army, but merely residing within the limits of the cantonments, is or is not, by reason of such residence, amenable to the jurisdiction of the Cantonment Joint Magistrate, provided the amount of the claim be under Rs. 200.

"II. Whether the fact of the defendant practising as a pleader in the courts in the City of Puná brings the suit within the jurisdiction of this court.

"III. If both the above questions be decided in the affirmative, can this court entertain the suit, when it is one coming within the cognisance of the Cantonment Joint Magistrate."

The Judge of the Small Cause Court was of opinion that the first two questions should be answered in the affirmative, and the third question in the negative, but being in doubt submitted them for the opinion of the Court.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court is of opinion that the defendant was amenable to the jurisdiction of the Cantonment Joint Magistrate.

That he was liable to be sued in the Small Cause Court, his practising his profession as a pleader being within the words "personally working for gain."

That the Cantonment Joint Magistrate and the Small Cause Court have concurrent jurisdiction in this case; and that the jurisdiction of the Small Cause Court does not take away the jurisdiction of the Cantonment Joint Magistrate within the meaning of Sec. 12 of Act XI. of 1865.

*Special Appeal No. 567 of 1867.*

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Nov. 21.

MAHA'RA'NA' FATESANGJI.....*Appellant.*

DESA'I KALYA'NRA'YA.....*Respondent.*

Todá Garás—*Limitation—Moveable Property—Act XIV. of 1859. Sec. 1., Cl. 16.*

In a suit brought by the plaintiff to establish his right to a *todá garás* allowance, and for arrears of it, it was held that *todá garas*, in the absence of special proof to the contrary, must be presumed to be moveable property. A suit for its recovery must, therefore, be brought within six years.

THIS was a special appeal from the decision of C. G. Kemball, District Judge of Súrat, in Appeal Suit No. 92 of 1867, affirming the decree of the Principal Ṣadr Amín of Súrat.

The plaintiff, on the 9th of October 1866, filed a suit to establish his right to a *todá garás* allowance in the inám village of Kalam, Táluká Wággrá, of the Broach collectorate, and also to recover seven years' arrears with interest.

The defendant pleaded the law of limitation, and urged that, the cause of action having arisen more than six years ago, the maintenance of the suit was barred by Cl. 16 of Sec. 1. of Act XIV. of 1859.

The Principal Ṣadr Amín of Súrat allowed the defendant's plea, and threw out the plaintiff's claim.

The District Judge, in appeal, affirmed this decree.

The special appeal was argued before WARDEN and GIBBS, JJ.

*Reid*, for the appellant:—The District Judge disposes of this case on the point of limitation only. He follows the decision of the High Court in S. A. No. 642 of 1865; and here, I submit, he is in error. The true origin of *todá garás* has not been determined. It seems, as remarked by Lord Kingsdown in the case of *Sambhúlál Girdharlál v. The Collector of Surat* (a), that all classes of *todá garás* have not had the same origin; and, therefore, each case must stand by itself. The rning of the High Court in S. A. No. 642 should

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be held to be applicable only to the particular *todá garás* the subject of that suit. The facts of the present appeal show that the *todá garás* allowance claimed by the plaintiff was a charge on the revenue of the village of Kalam, if not on the village of Kalam itself. The village accounts would show it to be such ; and indeed this has been admitted by the defendant's father. It has never yet been decided that a direct charge on land is not an interest in land. If the charge was originally a charge on land, and was afterwards converted by Government into a money payment, not secured upon any land, the case would be different ; but here the charge was originally a charge on land, and has so continued. I, therefore, submit that in this case the *todá garás* should be treated as immoveable property, and the twelve years' limitation be applied. The document containing the admission of the defendant's father alluded to above is not filed in the case. A copy of it is, however, on the records of this court, which may be referred to, and the cause remanded that the original may be put in. He also cited *The Collector of Súrat v. The Heiresses of Kúvarbái (b)*; *Keshavbhat bin Ganeshbhat v. Bhágirathibái kom Náráyanbhat (c)*. and S. A. No. 4277.

*Nánábhái Haridás*, on the other side, was not called upon.

WARDEN, J. :—*Todá garás* has always been held to be a species of black mail levied from the inhabitants of a village ; and there is nothing in this case to show that it, in any way, differs from those cases already decided. In the papers, on which Dr. Reid relied and asked for a remand, there is nothing to show that *todá garás* is a charge on the lands of the village. We must, therefore, hold, as in S. A. No. 642 of 1865, that it is of the nature of moveable property ; and, therefore, this claim is barred by Cl. 16 of Sec. 1. of Act XIV. of 1859.

GIBBS, J. :—I concur. I may also add that the request of the special appellant to remand the cause, in order to give him an opportunity of having the document, purporting to

(b) 2 Bom. H. C Rep., 253.

(c) 3 Bom. H. C. Rep., A.C.J. 75.

contain the admission of the defendant's father that this particular *todá garás* is a charge on land, filed, cannot be complied with. A certified copy of the paper being on the records of the court, we have, as empowered by the Code of Civil Procedure, called for and examined it; and we find that it does not contain an admission of the nature contended for by the special appellant's counsel. There is, therefore, no ground for a remand, and we must confirm the decree of the lower court.

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*Decree affirmed.*

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*Regular Appeal No. 15 of 1866.*

Sep. 4.

RA'JE VYANKATRA'V ANANDRA'V NIMBA'LKAR. *Appellant.*  
JAYAVANTRA'V bin MALHA'RRA'V RANADIVE. *Respondent.*

*Hindú Law—Adoption—Only Son—Age of Adopted.*

*Held:*—The adoption by a Hindú widow of an only son, if valid in every other respect, cannot be set aside by reason of the adopted being an only son of an advanced age.

An adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted to succeed to his estate.

THIS was an appeal from the decision of Arthur St. John Richardson, Judge of the District of Ahmednagar in Original Suit No. 4 of 1866.

The plaintiff, who is a Shudra by caste, brought this suit to recover the moveable and immoveable property of Gajrábáí, wife of Bhavánrám Rájó Nimbálkar, the original owner of the same, representing that she died on the 6th of February 1865, leaving no other heir her surviving but himself, and that the defendant, who was her servant, wrongfully possessed himself of the whole estate, and refused to deliver it up on demand.

The defendant, *inter alia*, answered that Gajrábáí was his mother's mother; that she had in her lifetime conveyed all her estate to him by a deed of gift, dated the 12th of February 1857; that the Imam Commissioner decided in 1854 that the jahágír was to terminate with the life of

1867. RÁJE V. A. NIMBÁLKAR v. JAYAVANTRA'V M. RANADIVE. Gajrábáí ; that on the application of Gajrábáí herself one-third of the jálhágír was ordered by Government to be continued to him, the defendant ; and that he was adopted by Gajrábáí on the 4th of February 1865.

The District Judge, on the evidence, recorded the following findings :—

“ My finding on the first issue is that Ráje Vyankaṭráv bin Anandráv Nimbálkar is, by the religious law of the parties, who are Hindús, and by the custom of the country, *one* of the family entitled to succeed to the estate, if there had been any, of the late Bhavánráv Rámráv Nimbálkar, to the exclusion of the party in possession of the houses and other property of the late Gajrábáí.

“ My finding on the second issue is that the evidence recorded does not show that the plaintiff, Ráje Vyankaṭráv, is the *sole* surviving heir of the late Bhavánráv bin Rámráv Nimbálkar.

“ My finding on the third issue is that the defendant, Jayavantráv, has acquired, by the express wish of the late Gajrábáí, and by the grant conferred by the British Government, presumably, though not on evidence, through the Collector of this district, by order of the 15th of September 1865, a title to a portion, namely, one-third of the jálhágír estate at the village of Mirajgám, and also, by order of the 9th of March 1866, acquired also the office of Pátíl of Mirajgám. The estates conferred by these grants are such as the British Government alone is competent to grant, and cannot be described as immoveable family property, to which the heirs of the late Bhavánráv Rámráv have established any hereditary title founded on Hindú law.”

The District Judge passed a decree in favour of the defendant.

The appeal was argued before WARDEN and GIBBS, JJ.

*Vishvanáth Náráyan Mandlik*, for the respondent, was called upon to prove the fact of the adoption, as he admitted that in the event of the adoption not being established, the appellant would be the heir.

*Pigot*, for the appellant:—There are several objections which, I submit, are fatal to the adoption. The person here adopted, Jayavantráv, the respondent, was at the time of his adoption a father, and possibly a grandfather. There is not even indirect evidence in the case to show that the husband of Gajrábáí had given her authority to adopt. Jayavantráv, the respondent, is, besides, the only surviving son of his father, and could not, according to the Hindú law, be adopted. Nearly seventy years having elapsed since the death of Gajrábáí's husband, it was an adoption to the widow alone.

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*Vishvanáth Náráyan Mandlik, contra* :—The Hindú law, although it does not recommend, permits the adoption of an only son; at least it does not set aside such an adoption otherwise validly performed. As to the question of the effect of adoption, S.A. No. 507 of 1863, decided by Arnould, C.J., and Forbes and Warden, JJ. (13th October 1864), ruled that adoption by a widow has the effect of divesting the widow's rights, and carrying back the effect of the adoption to her husband's death.

**WARDEN, J.** :—This action is brought by the plaintiff to be declared heir to the estate of Gajrábáí. On the side of the defendant an adoption is set up, and the counsel for the appellant urges that this adoption should be held invalid, on the ground that by the Hindú law an only son cannot be adopted. The authorities state that an only son should not be given in adoption, but if such an adoption has taken place, and the requisite ceremonies have been duly performed, then it cannot be set aside. I agree with the District Judge in holding that the adoption was performed with the proper ceremonies.

The terms of the deed of adoption generally, and particularly the use of the word “ours” therin, show that the property referred to was common to Gajrábáí and her deceased husband. The adopted son, therefore, became the heir not only to the property of the widow alone, but to that of both.

I, therefore, confirm the decree of the lower court with costs.

1837. GIBBS, J. :—I agree in the conclusion arrived at by my brother Warden. The suit was brought by the plaintiff as Rā'YE V. A. the heir of Bhavánrāv, the husband of the deceased Gajrábáí. NIMBALKAR v. When the case came on for trial, the learned counsel for the M. RANADIVE appellant, Mr. Pigot, and Ráv Sáheb Vishvanáth Náráyan Mandlik, for the respondent, admitted that in the event of no extraordinary circumstance, such as adoption, being established, the appellant would be the heir ; and further it was admitted that no question would arise as to the moveables, as the deed of gift by Gajrábáí was on a sufficiently stamped paper. The Court was, therefore, limited by consent (1) to the question of adoption ; and should that not be held proved, (2) whether the immoveable property, the inám and pátilkí watan, was confiscated by Government, and re-granted for political purposes to Gajrábáí, *i.e.*, whether it was a personal grant or not.

The case really turns on the question of adoption ; and, after carefully considering the evidence adduced, I can arrive at no other conclusion than that it did take place. The District Judge's finding is so obscure that we found it a matter of some doubt whether he held the adoption proved or not ; and had we been hearing a special appeal, this uncertainty would have given us some trouble ; but this being a regular appeal, we are Judges of fact as well as law, and can decide the issue for ourselves.

It appears that this old lady was left a childless widow in A.D. 1794, or about seventy-one years before she died, if we may believe that she was ninety years old at her death ; and undoubtedly she was found a claimant to a very considerable landed estate when the British Government succeeded to that portion of the Dakhan in which this inám is situated. It is not denied by the plaintiff that Bhavánrāv was a divided member of his father's family, and that his widow had, at all events, a life-estate in the immoveable property. It appears, then, that she took as an adopted daughter (I here use the word "adopted" in the ordinary English meaning, and not as it would be applied to a son under Hindú law) the mother of the respondent ; and the

respondent was born in Gajrábáí's house, and always lived there. Now it is proved by the deed of gift, No. 12, that Gajrábáí, on the 11th of February 1857, made a settlement of all she possessed on the respondent, reserving a life-interest in it for herself ; and as this document is on an eight-rupee stamp, and does not set out the value of the property, it is valid, if otherwise proved (which I find it to be), under Reg. XVIII. of 1827, Sec. xii., Cl. 2, which governs the case.

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Some negotiations appear to have been going on between the old lady and the Government regarding her ináms, and these were not concluded at her death, three days before which, to make the case of her *protégé*, the respondent, stronger, she appears to have adopted him with the usual ceremonies, and further to have executed the deed of adoption, No. 14, which is dated 4th February 1865. It has been urged that this document requires a stamp ; but the counsel for the appellant admits that he can find no law requiring such, and I consider that it is not inadmissible on this ground if otherwise proved, which I hold it to be.

The only serious argument on this subject that has been addressed to the court is, 1st, that the ages of the adoptor and the adopted are both too great, as also the interval between the death of Gajrábáí's husband and the date of the adoption, to admit of an adoption being permitted ; and also that the adoptee was an only son. But the rulings of this court, as shown from 2 Borr., p. 83 downwards, as also of the Calcutta courts, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone ; but the adoption must stand. Under these circumstances I need not say more on this portion of the argument. 2ndly, it is urged that the adoption is made by the old lady for her own estate, and is not good as affecting the estate of her late husband, and, therefore, that it will not affect the succession to the inám and watan. Mr. Pigot admits that he is unable to quote any precedent, but argues that,

1867. as the object of adoption by a widow is to benefit the soul of her deceased husband, Gajrábáí, having NIMBA'LKAR waited seventy years before she made this adoption, must be held to have done it for her own sake, and not for that of M. RANADIVE. Ráv Sáheb Vishvanáth Náráyan, on the contrary, quotes S. A. No. 507 of 1863 (decided, on the 13th of October 1864, by Arnould, Acting C.J., Forbes and Warden, JJ.) in which it was held that the adoption by the wife is an adoption to the husband's estate, and he urges that in this case as the pronouns are in the plural throughout the deed of adoption, it must clearly apply to the joint estate. I have no doubt that the old lady believed that the immoveable property had vested solely in herself; and the conduct of Government throughout led her to this opinion, and she never conceived that anything more was required than the deed of gift *plus* the deed of adoption to establish her *protégé* in the estate; but the latter in itself does not so clearly show this as the counsel for the appellant would have us hold. It is very general in its terms, and certainly does not exclude the husband's estate. But the real question is what is the Hindú law as held on this side of India on this point. Sir Thomas Strange states that an adopted son is in the same position as a posthumous son, and his inheritance dates from the death of the adopted father (*a*), and that a widow may adopt to her deceased husband is a fact invariably held. (*b*) It is asserted that a widow cannot adopt an heir to herself; but the case of the Sátárá Ráni has been alluded to as opposed to this. I believe the Ráni would have been only too willing to adopt to her late husband, had the paramount authority, the British Government, whose consent was necessary, permitted any other adoption save that to her own estate; but whether such an adoption is good or not is not a question which need be settled in the present case. I am of opinion that a son adopted is in the position of a natural son, and surely if a widow adopts, she must be held to adopt a

(*a*) 1 Strange 101; 2 Strange 127. (*b*) 2 Borr., p. 83, Reprint, Case 14.

son, not illegitimate as her son by other than her husband would be, but a son in the place of a legitimate natural-born son of her deceased husband. I think the silence of all texts or cases on the point raised so ingeniously by Mr. Pigot shows that such an idea would be contrary to the principles of Hindú law on the subject of adoption. I, therefore, consider the adoption of Jayavantráv good and binding on the estate of Bhavánráv, and the second question, therefore, does not arise; and I would confirm the District Judge's decree, throwing out the claim of the plaintiff with all costs.

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*Decree confirmed.*

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*Special Appeal No. 543 of 1867.*

Nov. 18.

DAVLATA' bin BHU'JANGA' *et al.* .... *Appellants.*  
BERU bin YA'DOJI *et al.* .... *Respondents.*

*Survey Number—Alienation—Consent of Heirs—Limitation.*

There is no precedent for ruling that the holder of a Survey field is incompetent to resign it without the consent of his heirs. A point of limitation must be decided, though raised at any stage of the cause.

THIS was a Special Appeal from the decision of R. W. Hunter, Senior Assistant Judge of the Puná District at Solápúr, in Appeal Suit No. 488 of 1865, reversing the decree of the Munsif of Pandharpúr.

The plaintiffs brought a suit to recover a share in certain fields from the defendants, who, they alleged, were members of the same family as themselves.

The defendants answered that one of the fields sued for, No. 30, was taken up by them after its abandonment by one Narsú, and the other fields after their abandonment by Yádoji, the plaintiff's father.

The Munsif, holding the plaintiffs' right not proved, threw out their claim.

They thereupon preferred an appeal. The defendants, under Sec. 348 of the Code of Civil Procedure, objected that

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the maintenance of the suit was barred, and claimed an issue upon this point.

The Senior Assistant Judge declined to raise the issue as to the suit being barred on the ground that it had not been brought forward in the court of first instance. On the other points arising in the case, he held that the lands belonged to the family of which the parties were members, and that it did not seem to him necessary to inquire into the circumstances of the abandonment of the fields by Yádoji, the plaintiff's father. He considered that it was to be presumed that even if he had formally resigned his share, he must have done so without the consent of his heirs.

The Appeal was heard before WARDEN and GIBBS, JJ.

*Vishvanáth Náráyan Mandlik* for the appellants:—The Judge below was wrong in not going into the question of limitation. He is bound to go into it at any stage of the case. The Judge below was also wrong in holding that a person unable to cultivate a field could not resign it without the consent of his heirs.

*Dhirajlál Mathurádás* for the respondents.

PER CURIAM:—The Senior Assistant Judge was in error in not raising and determining the issue of limitation. The rulings of this court have been that this issue must be decided whenever raised, even if taken for the first time in the court of special appeal. The case must be returned for this purpose. There is a difference set up as to title between No. 30 and the other fields; but the question whether Nársu was a mere holder under Government, or a tenant of the plaintiff's ancestors, was not gone into; it is found that he had held for more than twenty years, but there is no reason why a holder of a number might not be the owner also. Further, there is nothing to show what relationship exists between the parties, nor was any inquiry made as to whether the family were united or not, as raised in the defendant's reply. The Senior Assistant Judge has also apparently overlooked the fact that the defendants are in possession, and that the onus, therefore, would lie, in the first instance, solely

on the original plaintiff as a plaintiff in ejectment; he is further in error in presuming, without going more fully into the point, and giving reasons for his opinion, that a cultivator of a number cannot resign it without the consent of his heirs; it has nowhere been so ruled, and it is a question whether such a ruling could be supported. The decree of the Senior Assistant Judge is reversed, and the case remanded for re-trial on merits with reference to this judgment.

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DAVLATA'  
BHU'JANGA'  
et al.  
v.  
BERU  
YA'DOJI  
et al.

*Decree reversed, and suit remanded.*

—  
*Special Appeal No. 396 of 1867.*

Aug. 20.

MAHIPATRA'V CHANDRARA'V ..... *Appellant.*  
NENSUK A'NANDRA'V SHET MA'RVA'DI..... *Respondent.*

*Limitation—Minor—Guardian—Act XIV. of 1859, Sec. xi.*

Where the father of a minor lent on account a sum of money to the defendant and died without having received back the money, and the account was continued with the defendant by the mother and guardian of the minor, and a balance was struck during the minority of the infant.

*It was held that the cause of action arose at the time such balance was struck, and that, as the cause of action accrued to the minor during his disability, his representatives could sue to recover the balance at any time during the term of disability, and that a claim by the minor on attaining his majority, or, if he should die, by his representative, would not be barred if preferred within three years from the cessation of the disability. Further, the extension of the period of limitation conceded to a minor on account of legal disability, is not affected by the fact that during his majority he is represented by a guardian.*

THIS was a special appeal from the decision of A. C. Watt,  
Acting Assistant Judge of Púna, in Appeal Suit No. 123 of 1865, reversing the decree of the Principal Sadr Amín at Puná.

The appeal was heard before TUCKER and GIBBS, JJ.

*Vishvanáth Náráyan Mandlik* for the appellant.

*Dhirajlál Mathurádás* for the respondent.

The facts of the case, so far as material, are stated in the following judgment, delivered this day by—

1807. TUCKER, J. :—The plaintiff, as administrator to the estate of a minor, named Sambhújiráv, sued to recover a sum of Rs. 1,508-9-3, which, he alleged, had been deposited by the minor's father with the defendant in 1855, with interest at six per cent. per annum from the 9th of November 1855, when the account was settled, Rs. 827-10-8 ; total Rs. 2,336-3-11. The minor's father died on the 11th of July 1856.

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SHET  
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The defendant denied that there had been any deposit, but admitted that the plaintiff's father had an account with him up to the date of his death, which had been continued by his widow up to September or October 1858, when a balance was struck ; that no steps were taken to recover the debt till the present suit ; and that its maintenance was, consequently, barred. The defendant also pleaded a set-off of Rs. 915.

The Principal Sadr Amín held that the maintenance of the suit was not barred, as no cause of action accrued to the plaintiff, till he was appointed administrator to the minor's estate. He considered the debt due to the minor's estate proved, and that the alleged set-off, which was not satisfactorily established, might be recovered by the defendant in a separate suit, if he thought fit to bring an action. He, therefore, decreed to the plaintiff the amount claimed with simple instead of compound interest, and so deducted Rs. 104-10-9 from the amount mentioned in the plaint.

In appeal this decree was reversed by the Assistant Judge at Puná, who held that the maintenance of the action was barred by the Limitation Act.

In special appeal it has been contended that the Assistant Judge's decision on this point was erroneous.

The plaintiff claimed the money as a deposit, and relied on Cl. 15, Sec. 1. of Act XIV. of 1859. The Assistant Judge, though he raised an issue in the following terms :—“Has the plaintiff proved that he deposited the money?” recorded no finding on this issue, though in his finding on a previous issue, to wit : “Is the claim barred by limitation or

not?" he appears to have come to the conclusion that there was no evidence of any deposit having been made, and that the claim was for the balance of an account current between traders who had had mutual dealings, and to which the provisions of Sec. viii. of Act XIV. of 1859 applied. This is the view which the defendant himself took of his dealings with the minor's father, and also with the minor's mother after the father's decease; and from his written statement he appears to have considered that the cause of action arose in September 1858 (Ashvin, Shake 1780), when mutual dealings ceased. Supposing this view to be correct, it would seem that a right of action accrued to the minor in Ashvin 1858 to recover any balance which might have been then due from the defendant, and that, as he was under a disability when this right first accrued to him, any claim, which may be preferred by his representative during his disability, or by himself on attaining his majority, or, if he should die, by his representative subsequently, will not be barred till three years shall have expired from the date when the disability shall have ceased (Sec. xi. of Act XIV. of 1859). The Assistant Judge's view, that a minor is not under a disability if a guardian can sue on his behalf, is, in our opinion, erroneous, and opposed to the plain meaning of Sec. xii. of the Limitation Act.

We consider, then, that the claim must be treated as a claim on behalf of a minor to recover a balance due on an account current which continued between the defendant and the minor's father and minor's mother and guardian up to the month of Ashvin A.D. 1858; and that the Assistant Judge, having ruled wrongly on the preliminary point, must now decide whether the balance found to be due by the Principal Sadr Amín is correct; and whether the court of first instance decided rightly in refusing to allow the set-off of Rs. 915, which defendant alleged to be due on account of a partnership between himself and the plaintiff in a shop at Dhár. It is not clear who is meant by the designation "plaintiff" in the defendant's written statement and recorded examination before the Principal Sadr Amín—the

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A'NANDEA'V  
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1867. minor, or the minor's father, or the present administrator to the estate. This point must be elucidated before it can be decided whether the defendant can be allowed a set-off against the present claim.

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A'NANDRA'V  
SHET  
MA'RTA'DL.

We, therefore, reverse the decree of the Assistant Judge on the preliminary point, and remand the suit to the lower appellate court, for a new trial and decision on the merits, with advertence to the directions contained in this judgment. The costs of this special appeal to be borne by the defendant, the special respondent. The costs in both the lower courts to be apportioned at the final decision. We remark that it will be a proper case for the award of interest from the date of the institution of the suit till the date of payment, if ultimately any balance be decreed in favour of the plaintiff.

GIBBS, J., concurred.

*Decree reversed, and suit remanded.*

Dec. 12.

*Special Appeal No. 179 of 1867.*

VINA' YAK SADA'SHIV VOZE ..... *Appellant.*  
RA'GHI, widow of ALYA', HAS PA'TI'L bin  
ALYA', and KA'MLYA' bin ALYA' ..... *Respondents.*

*Lease—Agreement between Mortagor and Mortgagee—Rent—Interest—Act XXVIII. of 1855.*

The provision contained in Act XXVIII. of 1855 that any rate of interest which the parties may have agreed upon shall be awarded, in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of agreements made between persons, such as mortagor and mortgagee, trustee and *cestui que trust*, between whom relations exist, enabling one party to take advantage of the other, and from declining to enforce such agreements when they are shown to be unfair and extortionate.

THIS was a special appeal from the decision of S. H. Phillips, Assistant Judge of the Konkan at Thana, in Appeal Suit No. 457 of 1866, confirming the decision of the Munsif of Panvel.

The Appeal was heard before TUCKER and GIBBS, JJ.

The facts of the case sufficiently appear from the following judgment :—

TUCKER, J. :—This suit has been instituted by a mortgagee, subsequent to the redemption of the mortgage, to recover from the mortgagors the sum of Rs. 138-15-0, as the balance due on an agreement to pay a certain rent on the mortgaged land which was leased by the mortgagee to the mortgagors during the existence of the mortgage.

The defendants denied the execution of the agreement respecting rent, and pleaded that the claim was barred by the law of limitation.

The Munsif held that the plaintiff had received full satisfaction of the mortgage debt (principal and interest), and that he could not now recover any further sum on account of rent.

The Assistant Judge of Tháná confirmed this decree, on the ground that the rent fixed was extortionate, and that the plaintiff had received the full sum he was entitled to. He cited, in support of his decision, S. A. No. 530 of 1865, *Kedári bin Ránu v. A'tmárámbhatbin Náráyanbhat* (a).

In special appeal it has been contended that the precedent relied on by the Assistant Judge was inapplicable; that by the deed of mortgage the plaintiff was entitled to the usufruct of the land in lieu of interest; and that as the mortgagors afterwards took a lease of this land at a fixed rent from the mortgagee, they were bound to pay that rent, however high it might be; that Act XXVIII. of 1855 required that a Civil Court should enforce the payment of any rate of interest which might have been agreed upon between the parties, and the court in this instance was bound to carry into effect this agreement for rent, which was in lieu of interest.

The facts of this case appear to be as follows :—In 1849 the plaintiff took certain fields in mortgage as security for a

(a) 3 Bom. H. C. Rep., A.C.J. 11.

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debt of Rs. 30, the produce of the land to be enjoyed by the mortgagee in lieu of interest ; and on the same day the mortgagee let the lands to the mortgagors (a widow and her two sons), on their agreeing to pay him an annual rent of  $1\frac{1}{2}$  *khandi* and 1 *man* of *bhât* (rice in the husk), and 300 bundles of straw. The rent was paid from 1849 to 1861, or for eleven years. Subsequently the mortgagee instituted a suit to foreclose the mortgage, and he obtained a decree in appeal on the 17th of March 1865, in which it was declared that the mortgage was to be foreclosed if the principal sum due, or Rs. 30, was not paid within a certain time after the passing of the said decree. From this decision no special appeal was made ; and the mortgagors paid thirty rupees to the mortgagee and redeemed the field. The mortgagee now claims arrears of rent for three years, at the annual amount of grain fixed in the agreement, or from 1862 to 1864. The amount claimed as one year's rent is considerably in excess of the principal sum advanced, *i.e.*, thirty rupees ; and the lower courts have both found that the plaintiff has already received in the shape of rent the equivalent of Rs. 600, or just twenty times the sum originally advanced by him.

We are of opinion that, as a Court of Equity, we are bound to examine into the nature of agreements entered into between persons who stand to each other in the relation of mortgagor and mortgagee, trustee and *cestui que trust*, and that if it should appear that such agreements have been obtained under any pressure, owing to the existence of this relation, they should not be given effect to.

"In order to render a contract or an agreement of any kind binding, there must be the assent of both parties to the agreement, under such circumstances as to show there was no pressure, no influence existing of a kind to make the assent an imperfect assent, or an assent which under other circumstances would have been refused. If the assent to the agreement is not an assent given under such circumstances as that both parties are on an equal footing, and the agreement one perfectly free from any influence or pressure in the eye of this court, it is not an assent sufficient to con-

stitute an agreement." These are the words used by STUART, V. C., in the case of *Barrett v. Hartley* (b); and they command our acquiescence, as do also the further observations of the same learned Judge in the same case that "one effect of the repeal of the usury laws was to bring into operation, to a greater extent than formerly, another branch of the jurisdiction of the English Equity Courts, namely, the principle which prevented any oppressive bargain, or any advantage exacted from a man under grievous necessity, from prevailing against him." It appears to us that the doctrine thus enunciated is sound, and that, though the Legislature has provided that any rate of interest which the parties may have agreed upon shall be awarded, yet this enactment in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of agreements made between persons between whom relations exist which will enable one party to take advantage of the other, and from declining to enforce such agreements unless they are shown to be fair and reasonable. When they are not so, it may be justly inferred that the assent of the person who has subscribed the extortionate agreement has been obtained through the pressure which the other party has been able to apply, in consequence of the position in which the one stood to the other. In the present case the parties are mortgagors and mortgagee, and the mortgage deed only stipulated that the mortgagee was to have the usufruct of the land in lieu of interest. The mortgagee afterwards, instead of using the land himself, let it to the mortgagors under an agreement that they were to pay an annual rent, which he admits by his present claim to have been far in excess of the principal sum which he advanced on the mortgage, and which he received for eleven years. Now, it cannot be supposed that the mortgagors would have agreed to pay such a rent if they had been entirely free agents; and we must hold that the agreement, if ever executed (for that has not been found proved), was obtained under the pressure which the plaintiff's position as a mortgagee enabled him to put upon the defendants. The

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grain rent, which was reserved, appears to us to have been extortionate and oppressive, and the agreement to be of a character which, considering the relation of the parties, cannot equitably be enforced. We, therefore, affirm the decree of the Assistant Judge with costs on special appellant.

GIBBS, J. :—I concur.

*Decree affirmed.*

Dec. 13.

*Special Appeal No. 552 of 1866.*

BIIMA'CHA'RYA bin VYANKATA'CHA'RYA ... *Appellant.*  
FAKIRA'PPA' bin A'NANDA'PPA' ..... *Respondent.*

*Act VIII. of 1859, Secs. 41—111, and 119—Pleader—Ex parte hearing.*

*Held* that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant but not instructed to answer, or instructed not to answer at all, was an "*ex parte*" hearing, and that no appeal lay from a judgment passed in such suit.

THIS was a special appeal from the decision of W. Sandwith, Joint Judge of the District of Dhárwár, reversing the decision of the Ṣadr Amín of Húbli.

The plaintiff sued to eject his tenant, the defendant, from a field, alleging that, though the lease had expired, the defendant would not give up possession.

The defendant, Fakíráppá, duly appointed a vakíl, who, however, stated that he had received no instructions from his client with regard to the case, and that he was unable to put in any written statement, or make any defence.

The Ṣadr Amín, after several adjournments to enable the pleader of the defendant to get instructions, which were unsuccessful, at last proceeded with the trial of the case, and gave a decree in favour of the plaintiff.

In appeal, the Joint Judge considered that the defendant had not shown any valid reason for not instructing his pleader in the court of original jurisdiction; but still, being

of opinion that the plaintiff's claim was not established, reversed the Sadr Amín's decree.

The Appeal was heard before TUCKER and GIBBS, J.J.

*Shántárám Náráyan*, for the appellant, contended that the defendant, not having instructed his *vakil*, must be held to have made no valid appearance. And the judgment of the Court being thus *ex parte*, no appeal lay to the Joint Judge, according to Sec. 119 of the Code of Civil Procedure.

TUCKER, J. :—I find that the defendant in this suit, though he appointed a pleader, gave that pleader no instructions which would enable him to answer the claim, or rather, it may be gathered from the character of the pleader's reply to the Sadr Amín, he instructed the pleader to make no answer. Under these circumstances, I hold that the hearing in the court of original jurisdiction was *ex parte*, and that the judgment pronounced by that court was also *ex parte*, and that, consequently, no appeal lay from that judgment. By Sec. 41 of the Code of Civil Procedure it is provided that a summons "shall be issued to the defendant to *appear and answer* the claim in person, or by a pleader of the court *duly instructed*, and *able to answer* all material questions relating to the suit, or by a pleader who shall be accompanied by some other person able to answer all such questions."

From this it would seem that the mere presence of a pleader for a defendant is not all that is necessary to constitute a compliance with the summons, or to make such a complete appearance on his behalf as is requisite under Sec. 111 of the Procedure Code. If a pleader attend, he must be instructed and able to answer, or be accompanied by some person who will be able to answer all material questions relative to the suit; and the presence of a pleader who is not supplied with the means of answering, or who is instructed to remain mute, or to decline making any answers, cannot, I think, be held to be a representation of the defendant, which will give to the suit the character of a defended action. The policy of the law and the course of justice would both be de-

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VYANKATA'-  
CHA'RYA  
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A'NANDA'TPA'.

1807. feated if such an appearance were to be treated as otherwise than nugatory. The decree of the Joint Judge must, therefore, be annulled, and that of the Sadr Amín confirmed.

<sup>v.</sup>  
BHI'MA'CHA'-  
RYA  
VYANKATA'-  
CHA'RYA  
FAKI'RA'PPA'  
A'NANDA'PPA'.

GIBBS, J. :—I concur.

*Joint Judge's decree annulled, and the Sadr Amín's confirmed.*

# CROWN CASES

DECIDED IN THE

## ORIGINAL AND APPELLATE JURISDICTIONS OF THE HIGH COURT OF BOMBAY.

REG. V. A'MBA' kom GIRSOJI.

1867.  
June 12.

*Ind. Pen. Code, Secs. 323 and 324—Crim. Proc. Code, Sec. 434.*

In a case referred by a District Magistrate, under Sec. 434 of the Crim. Proc. Code, on the ground that the sentence was illegal: because the charge should have been, under Sec. 324 of the Penal Code, for causing hurt by means of a heated substance,—an offence which the Second Class Subordinate Magistrate had no jurisdiction to try; and not under Sec. 323, for causing hurt, of which offence the accused had been convicted:—

The Court passed no order; as it did not think it right, under the circumstances of the case, to direct the re-trial of the accused on the proper charge.

THE accused was convicted by a Second Class Subordinate Magistrate of the offence of voluntarily causing hurt under Sec. 323 of the Indian Penal Code; and sentenced to pay a fine of Rs. 10.

The record and proceedings had been called for by H. N. B. Erskine, Acting Magistrate of Ahmednagar; and were referred for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, with the following remark:—“It appears from the record of the case that the prisoner should have been tried, under Sec. 324 of the Penal Code, for voluntarily causing hurt by using a hot iron,—an offence which the Second Class Subordinate Magistrate had no authority to try; and the sentence seems, therefore, illegal.”

PER CURIAM (COUCH, C.J., NEWTON and WARDEN, JJ.):—The Court returns the papers, and passes no order; as it does not think it right, under the circumstances, to direct the trial of the accused on the proper charge.

*No order.*

1867.  
July 11.

## REG. v. NABA'JI valad VITHOJI.

*Ind. Pen. Code, Secs. 323 and 324—Crim. Proc. Code, Sec. 427.*

In a case referred by a District Magistrate, under Sec. 427 of the Crim. Proc. Code, on the ground that the charge should have been under Sec. 324 of the Penal Code,—an offence not within the cognisance of a Second Class Subordinate Magistrate ; and not under Sec. 323 :—

The Court passed no order ; and remarked that the case should not have been referred under Sec. 427, which applies only to the Court of Session acting in appeal from a court subordinate to it.

THE accused was convicted by a Second Class Subordinate Magistrate, under Sec. 323 of the Indian Penal Code ; and sentenced to suffer eight days' rigorous imprisonment.

The case was referred for the orders of the High Court, under Sec. 427 of the Criminal Procedure Code, by H. N. B. Erskine, Acting Magistrate of Ahmednagar, with the following remarks :—

“ The prisoner appears to have used violence to his wife,—to have burnt her on the thigh with a hot iron. The offence was one, therefore, that should have been tried under Sec. 324 of the Indian Penal Code ; and not one within the cognisance of a Second Class Subordinate Magistrate.

“ I may add, the wounds do not seem to have been very serious, as on the 8th of April, sixteen days after the attack, the complainant stated they had healed. If this was the case, however, the offence would not, under any circumstances, be ‘ grievous hurt,’ as the sufferer was not for twenty days in severe bodily pain.”

PER CURIAM (COUCH, C.J., NEWTON and WARDEN, J.J.) :—  
The Court returns the papers, and passes no order ; as it does not think it right, under the circumstances, to direct the re-trial of the accused upon the proper charge.

It should be pointed out to the Magistrate that he should not have referred the case under Sec. 427 of the Criminal Procedure Code ; as the offence of which the accused was convicted was an offence triable by the Second Class Subordinate Magistrate. Sec. 427 applies only to the Court of Session acting in appeal from a court subordinate to it.

*No order.*

## REG. v. GANU valad RA'MCHANDRA.

1867.  
July 11.

*Ind. Pen. Code, Secs. 403 and 406—Criminal misappropriation—Criminal breach of trust—Crim. Proc. Code—Jurisdiction—New Trial.*

In a case referred by a District Magistrate, on the ground that the accused had been convicted, under Sec. 403 of the Penal Code, of dishonest misappropriation of property; whereas the charge should have been, under Sec. 406, of criminal breach of trust—an offence not within the cognisance of the Second Class Subordinate Magistrate who passed the sentence :—

The Court annulled the conviction and sentence; and directed the case to be tried before a proper court.

THE prisoner was convicted, by a Second Class Subordinate Magistrate, of the offence of dishonest misappropriation of property; and sentenced to eight days' simple imprisonment, under Sec. 403 of the Indian Penal Code.

The case was referred for the orders of the High Court, under Sec. 427 (a) of the Criminal Procedure Code, by H. N. B. Erskine, Acting Magistrate of Ahmednagar, with the following remark :—

“ It appears from the proceedings, however, that the property misappropriated had been intrusted to the prisoner's care by the complainant; and the offence, therefore, was 'criminal breach of trust,' punishable under Sec. 406 of the Indian Penal Code,—an offence not triable by a Second Class Subordinate Magistrate.”

PER CURIAM (COUCH, C.J., NEWTON and WARDEN, JJ.):—The Court annuls the conviction and sentence; and directs that the case be returned for trial, on a charge of criminal breach of trust, before a proper court.

*Conviction annulled and New Trial ordered.*

(a) See the Court's remark in the last case.—ED.

1867.  
July 18.

## REG. V. LARKINS.

*Complaint—Magistrate F. P.—Railway Act.*

A conviction and sentence by a Magistrate F. P. under the Railway Act reversed; there being no complaint made before the Magistrate, as required by the Code of Criminal Procedure.

THE record and proceedings in this case were referred for the orders of the Court, under Sec. 434 of the Code of Criminal Procedure, by R. H. Pinhey, Session Judge of the Konkan, with the following remarks:—

“ Read an extract from the Report of criminal cases disposed of by the District Magistrate and Magistrates F. P. in the Tháná District during the month of May 1867, wherein the accused, Daniel Larkins, was entered as having been charged with the offence of having been drunk while on duty as guard of the No. 28 down goods train; and convicted of the said offence, and sentenced to pay a fine of Rs. 40, in default to undergo one month's rigorous imprisonment, under Secs. 27 and 34 of Act XVIII. of 1854, by Captain Lewis, Railway Magistrate F. P.

“ I am of opinion that the conviction and sentence passed in this case are illegal. The Full Power Magistrate appears to have had no sworn complaint before him; and to have been set in motion by, and acted alone on, a sort of demi-official or private note from a Mr. Edington, Traffic Superintendent on the G. I. P. Railway, beginning with “ Dear Sir,” and winding up with “ yours truly.”

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court reverses the conviction and sentence.

REG. v. BA'BJI valad BA'PU.

1867.

July 24.

*Whipping Act, No. VI. of 1864—Previous Conviction.*

On a reference by a Session Judge, under Sec. 434 of the Crim. Proc. Code, a sentence of whipping in addition to one of rigorous imprisonment, in the case of an offence specified in Sec. 4 of Act VI. of 1864, was annulled ; as the prisoner had not been previously convicted of the same offence.

THE prisoner was convicted, by W. A. East, Magistrate F. P. in the Puná District, of the offence of committing housebreaking by night with intent to commit theft and sentenced, under Sec. 457 of the Indian Penal Code, to suffer one year's rigorous imprisonment, and, in accordance with the provisions of Act VI. of 1864, Secs. 4 and 10, to receive fifty lashes with a cat of nine tails, in the manner prescribed by law, after fifteen days of such imprisonment.

The record and proceedings had been called for by R. W. Hunter, Acting Session Judge of Puná, and were referred for the orders of the High Court, under Sec. 434 of the Criminal Procedure Code, with the following remark :—

“ The sentence of whipping was passed by Mr. East under Sec. 4 of Act VI. of 1864, but the accused has not been previously convicted of the *same* offence, nor even of any of the offences mentioned in that section.”

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court annuls the sentence of whipping, as the accused does not appear to have been previously convicted of the same offence.

NOTE.—See 3 Bom. H. C. Rep., Cr. Ca., pp. 37, 38.—ED.

1867.  
July 24.

REG. v. A'UBA bin BHIVR'AV.

*Ind. Pen. Code, Sec. 228—Prevarication—Crim. Proc. Code, Sec. 163.*

*Held* that prevarication while giving evidence does not constitute the offence, under Sec. 228 of the Ind. Pen. Code, of intentionally causing interruption to a public servant sitting in a judicial proceeding.

THE prisoner was convicted of the offence of intentionally causing interruption to W. A. East, Magistrate F. P. in the Puná District, by prevaricating whilst giving evidence ; and sentenced to pay a fine of Rs. 3, under Sec. 228 of the Penal Code and Sec. 163 of the Criminal Procedure Code.

The record and proceedings were referred for the orders of the High Court, by R. W. Hunter, Acting Session Judge of Puná, under Sec. 434 of the Criminal Procedure Code, with a remark to the effect that prevarication did not amount to causing interruption.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court reverses the conviction and sentence passed upon the prisoner ; as the fact found by the Magistrate, that the witness prevaricated while giving evidence, does not constitute the offence of causing interruption to a public servant sitting in a judicial proceeding.

*Conviction and sentence reversed.*

REG. v. PA'NDU bin VITHOJI.

1867.  
July 24.

*Ind. Pen. Code, Sec. 228—Refusing to answer questions—Crim. Proc. Code, Sec. 163.*

*Held* that refusing or neglecting to return direct answers to questions does not constitute the offence, under Sec. 228 of Ind. Pen. Code, of intentionally offering insult or causing interruption to a public servant sitting in a judicial proceeding.

THE prisoner was convicted of the offence of intentionally causing interruption to W. A. East, Magistrate F. P. in the Puná District, by refusing to return direct answers to the questions of the Court, although frequently warned not to do so; and was sentenced to pay a fine of Rs. 5, under Sec. 228 of the Indian Penal Code and Sec. 163 of the Code of Criminal Procedure.

The record and proceedings were referred for the orders of the High Court, by R. W. Hunter, Acting Session Judge of Puná, under Sec. 434 of the Criminal Procedure Code.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court reverses the conviction and sentence; as the finding of the Magistrate F. P., that the witness refused or neglected to return direct answers to questions, is not a finding that the witness committed the offence, under Sec. 228 of the Indian Penal Code, of intentionally offering insult or causing interruption to a public servant sitting in a judicial proceeding.

*Conviction and sentence reversed.*

1867.  
July 24.

## REG. V. KUBERIO RATNO.

*Crim. Proc. Code, Sec. 277—Subordinate Magistrate—Magistrate F.P.—District Magistrate.*

On a reference by a District Magistrate a sentence passed by a Magistrate F. P., in a case submitted to him by a Second Class Subordinate Magistrate, under Sec. 277 of the Crim. Proc. Code, annulled : as the Magistrate of the District alone had power to dispose of cases under that section.

THE prisoner was tried by the Second Class Subordinate Magistrate of Ankleshwar, who submitted his proceedings, under Sec. 277 of the Criminal Procedure Code, to the Magistrate F. P. at Hansot, with the expression of his opinion that the offence proved against the prisoner called for a more severe punishment than he himself was competent to adjudge.

The prisoner thereupon was convicted by the Magistrate F. P. of the offence of voluntarily causing grievous hurt without provocation, and sentenced to suffer four months' rigorous imprisonment, and to pay a fine of Rs. 15, and in default to suffer further rigorous imprisonment for one month.

The record and proceedings were referred for the orders of the High Court, by T. C. Hope, Magistrate of the District of Sûrat, under Sec. 434 of the Code of Criminal Procedure, with the remark that Sec. 277 of the Code authorised only the Magistrate of the District (to whom the Second Class Magistrate is subordinate) to dispose of cases submitted to him in that way.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court annuls the sentence passed by the Magistrate, F.P.; and returns the case to the Magistrate of the District for disposal.

NOTE.—Sec. 277: “If in any case tried by a Subordinate Magistrate having jurisdiction, in which the accused person is found guilty, such Magistrate shall consider the offence established against the accused person to call for a more severe punishment than he is competent to adjudge, he shall record the finding, and submit his proceedings to the Magistrate to whom he is subordinate, and such Magistrate shall pass\* such sentence or order in the case as he may deem proper, and as shall be according to law. In any such case, the Magistrate to whom the proceedings are submitted, may examine any witness who shall already have given evidence in the case, and he may call for or take any further evidence.”

REG. v. BHIKOBA' VINOB'A and others.

1867.  
July 10.*Bombay Act No. III. of 1866, Sec. 1., Cl. 2—The words "Three Miles"—Construction.*

*Held* that the words "three miles" in Bombay Act No. III. of 1866, Sec. 1., Cl. 2, must be construed as three miles measured in a straight line along the horizontal plane, that being the most convenient meaning of the words, and the most capable of being ascertained.

THIS was a conviction of thirteen persons charged, under Sec. 4 of the Bombay Act No. III. of 1866, with gaming in a common gaming-house, 'not more than three miles' distance from' the railway station at Kurlá, and one of them, under Sec. 3 of the Act, with keeping a common gaming-house, and sentenced, by I. Dracup, Magistrate F. P. in the Tháṇá District, to pay fines of various amounts, or in default to be imprisoned for certain periods.

Six of the accused appealed for the reversal of the conviction and sentence, to R. H. Pinhey, Session Judge of the Konkan, who referred the case for the order of the High Court with the following remarks :—

"The only argument urged in this court was that the appellants committed no offence; because the gambling-house, in which they gambled, is more than three miles distant from the railway station at Kurlá.

"The question is, how are the three miles mentioned in the Bombay Act No. III. of 1866, Sec. 1., Cl. 2, to be measured. If by the road, then it is clear that the appellants committed no offence; for the house in which they gambled is by the road  $3\frac{1}{2}$  miles from the Kurlá station. But I do not think the three miles mentioned in this clause need be measured along a macadamised road; for it would often happen that no such road had been made between a station-house and some particular gambling-house. I am of opinion that the three miles should be measured from point to point—from the station-house to the gambling-house—along such a line as it is possible for the gamblers to go, without incurring break-neck obstacles. Under this view of the

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meaning of the Law, I think it must still be held in this case that the gambling took place 'more than three miles from' the Kurlá station. The surveyor, Náráyan Gopál Paṭvardhan (witness No. 2), who measured the distance between the Kurlá station-house and the house of the appellant Bhikobá Vinobá, with a prismatic compass and chain, brought the distance to less than three miles by about six hundred feet, by adopting a radius line stretching from point to point, and passing through all obstacles, hills included. But neither gamblers nor any other men can go through hills in this way; and, therefore, the surveyor's radius line is as useful for the purposes of this case, as a line drawn through the earth's centre to the antipodes would be to a traveller who wanted to know the distance between Tháná and the opposite side of the globe. It is evident that too great reliance must not be placed on the surveyor's radius line, for he himself says: 'If the distance were measured with a chain, it might exceed three miles.'

"I am, therefore, of opinion that it cannot be held in this case that the house in which the gambling took place, is (in the words of the Act) 'not more than three miles' distance from' the railway station at Kurlá; and I, therefore, reverse the conviction and sentence, recorded by the Magistrate F. P., against the six accused persons who appealed to this court.

"As to the remaining seven persons, who were convicted and sentenced by the Magistrate F. P., I have no jurisdiction to interfere, as they have not appealed; but if my view of the Law is correct, these seven persons are equally entitled to have their convictions reversed with the six whose convictions I have reversed."

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Court is of opinion that the Legislature, in Sec. 1., Cl. 2, of Bombay Act No. III. of 1866, must be considered to have intended to express the meaning which would be the most convenient, and the most capable of being ascertained; and that, in accordance with that principle of construction, the "three

“miles” must be measured in a straight line along the horizontal plane.

The courts in England have put this construction upon similar words in Acts of the Imperial Legislature : *Lake v. Butler* (*a*) ; and the reason for doing so is equally applicable to this Act.

The Court declines to reverse the decision of the Magistrate, which is right.

*Conviction affirmed.*

(*a*) 5 E. & B. 92.

~~REG. v. KUSHYA' BIN YESU.~~

Sept. 18.

*Previous Conviction—Punishment after—Ind. Pen. Code, Secs. 75 and 380.*

A prisoner convicted, under Sec. 380 of the Indian Penal Code, of theft in a building used for the custody of property, was sentenced, under Sec. 75, to fourteen years' transportation, as he had been previously convicted thirteen times of offences *now* punishable, under Chap. XVII. of the Code, with imprisonment for three years or upwards :—

*Held* that, as all the previous convictions were prior to the passing of the Indian Penal Code, the present offence was not punishable under Sec. 75.

THE prisoner was convicted by R. F. Mactier, Session Judge of Sátárá, under Sec. 380 of the Indian Penal Code, of the offence of theft in a “building used for the custody of property,” and sentenced, under Sec. 75 (*a*), to transportation for fourteen years; as he had been previously convicted thirteen times of offences *now* punishable, under Chap. XVII. of the Code, with imprisonment for three years or upwards.

The record and proceedings having been sent for on hearing the prisoner's petition, the case came on for disposal this day before COUCH, C.J., and NEWTON, J.

(*a*) Sec 75.—“Whoever, having been convicted of an offence punishable, under Chapter XII. or Chapter XVII. of this Code, with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life, or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years.”

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1867. COUCH, C. J. :—As all the previous convictions were prior to the passing of the Indian Penal Code, the prisoner is not subject for the present offence to be punished under Sec. 75.

REG. v. KUSHYA' BIN YESU. We, therefore, reduce the sentence to seven years' rigorous imprisonment, the highest amount of punishment to which the prisoner is liable, under Sec. 380 of the Code.

*Sentence altered.*

Sept. 26.

REG. v. ZORA KARUBEG.

*Conviction on several Charges—Punishment in excess—Criminal Intimidation—Ind. Pen. Code, Secs. 506 and 507.*

Where a person, though charged under two heads, was found guilty of what was substantially but one offence :—

*Held*, that it was improper for the Session Judge to record a conviction under two sections of the Indian Penal Code; and thereupon to award a punishment of two years' imprisonment in excess of what the law prescribed for the offence committed.

THE prisoner was convicted, by C. G. Kemball, Session Judge of Súrat : (1) of the offence of criminal intimidation, the threat being to cause the death of one Jibhái Rámdás, and (2) of criminal intimidation, by posting up an anonymous communication against the said Jibhái Rámdás; and was sentenced, under Secs. 506 and 507 of the Indian Penal Code, for the 1st offence to suffer seven years' rigorous imprisonment, and for the 2nd offence to suffer two years' rigorous imprisonment.

The High Court, on reviewing the Session Judge's monthly Criminal Return, sent for the record and proceedings.

PER CURIAM (COUCH, C. J., and NEWTON, J.) :—The Court reverses the conviction of Zora Karubeg under the 2nd head of the charge, on the ground that there was but one offence committed, and that it was improper for the Session Judge in such a case to record a conviction under two sections of the Indian Penal Code, and thereupon to award a punishment of two years' imprisonment in excess of what the law prescribes for the offence which was committed.

*Conviction under 2nd head annulled.*

NOTE.—See *Reg. v. Ganú Ládu*, 2 Bom. H. C. Rep. 132.—ED.

## REG V. MATHUR PURSHOTAM and another.

1867.  
Oct. 4.

*Act III. of 1857 (Trespasses by Cattle)—Rescuing after Seizure—Jurisdiction—Reg. XII. of 1827, Sec. XLIII.—(Repealing) Act XVII. of 1862—Crim. Proc. Code.*

The latter portion of Sec. 13 of Act III. of 1857 having been repealed by Act XVII. of 1862:—

*Held that the offences created by that section may be dealt with by the ordinary criminal tribunals, subject to the provisions of the Code of Criminal Procedure.*

THE accused were convicted, by a Second Class Subordinate Magistrate, under Sec. 13 of Act III. of 1857, of “the offence of forcibly rescuing cattle, after seizure, from the seizer, when conveying them to a pound;” and sentenced to pay a fine of Rs. 5 each, or, in default, to be imprisoned for seven days.

The record and proceedings had been sent for and examined by G. W. Elliot, Acting District Magistrate of Khedá; and were forwarded for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure, with the following remarks:—

“The question is, had the Second Class Subordinate Magistrate jurisdiction? The repealing by Act XVII. of 1862 of so much of Sec. 13 as formerly authorised Police Officers to deal with offences contemplated by it [according to the provisions of certain Regulations], leaves it doubtful whether he had jurisdiction or not. But as Sec. 14 of the Act gives authority ‘to the Magistrate, or to any Joint, Deputy, or Assistant Magistrate, or other Officer having criminal jurisdiction, authorised to receive and try charges without reference by the Magistrate,’ to deal with a complaint (by the owner) against the seizure of cattle, the forcible opposition to which is the subject of the preceding section, it would seem within a liberal reading of the law to consider that the intention of the enactment, concerning the authorities competent to deal with offences contemplated under Secs. 13 and 14 of the Act, was to give to the same officers like jurisdiction under either section; and if this reasoning

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be admitted, which is a point I put for decision, it would follow that Second Class Subordinate Magistrates have jurisdiction to deal with offences under Sec. 13, for they are officers having criminal jurisdiction authorised to receive and try charges without reference by the Magistrate." \* \* \*

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The latter portion of Sec. 13 of Act III. of 1857 (a) having been repealed by Act XVII. of 1862, the offences created by that section may be dealt with by the ordinary criminal tribunals, subject to the provisions of the Code of Criminal Procedure, and in this case the Second Class Subordinate Magistrate having passed a sentence within his power, the proceedings are regular.

Oct. 9.

REG. v. LINGANA' bin GIUBANA' and others.

*Act III. of 1857, Sec. 18—Pigs—Public Road—Damage—Trespass—Mischief.*

In the case of a conviction by a Subordinate Magistrate, under Sec. 18 of Act III. of 1857, of a person who, through neglect, permitted a public road to be damaged, by allowing his pigs to trespass thereon:—

*Held*, on a reference by the District Magistrate, that the conviction was not illegal, because the land damaged was a public road; as the right to use a public road is limited to the purposes for which the road is dedicated.

THE record and proceedings in this case were sent for, on the following reference by J. Elphinston, Acting District Magistrate of Cánará:—

“The Subordinate Magistrate of Haliál last month fined a man, under Sec. 18 of Act III. of 1857, because his pigs were, by his neglect, permitted to damage the public road.

“The Assistant (Full Power) Magistrate, on the Sub-Magistrate's Criminal Return, objects to this section having

(a) Sec. 13.—“Every person who shall forcibly oppose the seizure of cattle doing damage to land, or to crops or other produce of land, or shall forcibly rescue the same after seizure, either from a pound or from the seizer, when conveying or about to convey them to a pound, shall be liable for each offence to imprisonment, with or without labour, for a period not exceeding six months, or to a fine not exceeding five hundred Rupees, or to both. [Offences under this Section shall be dealt with by the Police Officers according to the provisions of \* \* \* and Sec. XLIII., Reg. XII., 1827, of the Bombay Code.]—Repealed.]—ED.

been quoted, because it refers to trespass, and the pigs could not be held to be trespassing when on the public road; and suggests that Sec. 425 of the Indian Penal Code was the proper section to quote.

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"It, however, appears, from the wording of this section, its illustrations and explanations, that to have committed mischief, it is not sufficient that the accused should have permitted the destruction or damage of property, but that he must have intended to cause damage to some person or to the public; and this element of criminal intent is wanting in the case in point, which was one of simple neglect, though damage was caused thereby.

"I, therefore, respectfully desire to be informed, in case of damage to the public caused by neglect on the part of the owners of cattle or pigs, whether the owners are liable under Sec. 18 of Act III. of 1857 (a), or under Secs. 425 and 426 of the Indian Penal Code."

PER CURIAM (COUCH, C.J., and NEWTON, J.):—The Magistrate should be informed that the conviction is not illegal. The right to use a public road is a limited one; and if the road is found to have been used for other purposes than those allowed, there is a trespass.

(a) Sec. 18:—"Any person, being an owner or keeper of pigs, who, through neglect or otherwise, shall damage, or cause or permit to be damaged, any land, or any crop, or produce of land, by allowing pigs to trespass thereon, shall be liable for such offence to a fine not exceeding ten Rupees. All sums recovered under this and the last preceding section may be appropriated, in whole or in part, to compensate the complainant for damage proved to the satisfaction of the Magistrate."

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Oct. 9.

## REG. v. BA'BA'JI bin BHA'U' and another.

*Ind. Pen. Code, Secs. 405 and 417—Crim. Proc. Code, Secs. 426 and 434.*

On a reference by a District Magistrate under Sec. 434 of the Criminal Procedure Code, where the conviction by a Subordinate Magistrate was for cheating ; when it should have been for criminal breach of trust, for which the punishment awarded was a legal one :—

*Held*, that there was no occasion for the Court to interfere with the conviction or sentence.

THE prisoners were convicted, by the First Class Subordinate Magistrate of Pandharpur, in the Puná District, of cheating, under Sec. 417 of the Indian Penal Code, in that some silver having been intrusted to them for the purpose of making ornaments, they introduced copper ; and were sentenced each to suffer four months' rigorous imprisonment, and to pay a fine of Rs. 150, or in default to suffer further imprisonment for a month and a half.

The record and proceedings had been called for and examined by J. E. Ohphant, District Magistrate of Puná ; and were referred for the orders of the High Court, with the remark that the offence appeared to be criminal breach of trust under Sec. 405 of the Indian Penal Code, and not cheating.

PER CURIAM (COUCH, C.J., and NEWTON, J.) :—The Subordinate Magistrate should be informed that the offence was criminal breach of trust, and not cheating ; but as the accused have not been sentenced to a larger amount of punishment than could have been awarded for that offence, there is no occasion for the Court to interfere with the conviction or sentence.

*No order.*

NOTE.—See *Reg. v. Rághoji bin Kánoji*, 3 Bom. H. C. Rep., Cr. Ca., 42.—ED.

## REG. v. FRANCIS CASSIDY.

1867.  
Dec. 23.

*Murder—Attempt to Murder—Loaded rifle—Surplusage—Charge—Ind. Pen. Code, Secs. 299, 300, 307, and 511.*

In order to constitute the offence of attempt to murder under Sec. 307 of the Ind. Pen. Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events.

*Aliter* under Sec. 511 taken in connection with Secs. 299 and 300.

Therefore, where the prisoner presented an uncapped gun at E. G. (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger:—*Held* that he could not be convicted of an attempt to murder, upon charge framed under Sec. 307 of the Indian Penal Code; but that, under the same circumstances, he might be convicted, upon a charge of simple attempt to murder framed under Sec. 511 in connection with Secs. 299 and 300.

Unnecessary allegations in a charge may be rejected as surplusage.

Apparent inconsistency between the English law, with reference to attempts, as laid down in *Reg. v. Collins*, and the provisions of the Indian Penal Code explained.

AT the Fifth Criminal Sessions of 1867, before WESTROPP, J., and a Special Jury, the prisoner was charged under the 307th section, and under the 299th, 300th, and 511th sections combined, of the Penal Code: (1) With having attempted to murder one E. G., by doing an act, with such intention and under such circumstances, that if he had by that act caused death, he would have been guilty of murder; (2) With having attempted to murder one E. G., by doing an act, with such knowledge and under such circumstances, that if he had by that act caused death, he would have been guilty of murder; (3) With having attempted to murder one E. G., by doing an act, knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being, and committing such last-mentioned act without any excuse for incurring the risk of causing such injury as aforesaid, and in such attempt with having done an act towards the commission of the said offence, to wit, with having presented a loaded rifle at the said E. G.

The prisoner was also charged (4) with an attempt to “voluntarily cause hurt,” (5) with an attempt to “voluntarily cause grievous hurt,” and (6) with an assault.

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Francis Cassidy was a private in Her Majesty's 45th Regiment of Foot. On the evening of the 29th of September 1867, he, being then quartered with his regiment at Puná, entered the regimental canteen, with his rifle in his hand, and presented it at the officer in charge of the canteen, Drum-Major Griffiths. Serjeant Bell, who was standing near the prisoner, observing this, pushed up the rifle. The prisoner was then taken into custody. On his way to the cell he expressed surprise and regret that there had been no cap on his rifle. On the morning of the day in question the prisoner had been intoxicated, and had been heard to utter threats against the Drum-Major; and although at the time of his presenting his rifle at the Drum-Major, he had partially recovered from the effects of his intoxication, yet he was still at that time under the influence of liquor. The rifle was subsequently examined, when it was found to be loaded with powder and ball, but there was no cap on the nipple.

In answer to questions put to them by the learned Judge, the jury found: (1) That when the prisoner presented the rifle, there was no cap upon the nipple; (2) That the prisoner did not pull the trigger; (3) That the gun was loaded with powder and ball; (4) That the prisoner presented the gun at the Drum-Major, (a) with the intention of murdering him, (b) with the intention of causing grievous hurt to him, (c) with the intention of causing hurt to him; (5) That the prisoner used criminal force to the Drum-Major, and in so doing assaulted him.

And generally the jury found the prisoner *Guilty* upon all the heads of charge, subject to the question of law reserved by the learned Judge (in accordance with Cl. 24 of the Amended Letters Patent), whether the prisoner could rightly, under the circumstances, be convicted upon all or any of them.

The case was argued on the 6th and 7th of December before COUCH, C.J., and WESTROPP, J.

COUCH, C.J.:—Following the English practice, counsel in support of the conviction should begin.

*The Advocate General (Honourable L. H. Bayley) and Macpherson, in support of the conviction :—The prisoner may properly be convicted under all the heads of charge. The jury have found the intent; and the prisoner has done an act towards carrying that intent into execution.*

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[COUCH, C.J.:—Under Sec. 307, must not the act be one that might cause death? an act capable of causing death? The words of the section are: “And under such circumstances,” &c. The merely presenting an uncapped gun could not possibly cause death.]

We contend that the act need not be the last in the series of acts that immediately precede the commission of the offence. The absence of a cap is immaterial, as the findings of the jury show that the prisoner believed the gun to be capped.

[WESTROPP, J.:—Do not the illustrations tend to show that such a finding does not bring the case within the meaning of the section?]

The cases put by the illustrations are extreme; intermediate ones are not excluded by them.

This objection does not, however, apply to the 3rd head. That is framed under Secs. 299 and 511 of the Penal Code. That a charge may be so framed is shown from Sec. 10 of Act XVIII. of 1862. Sec. 307 is not exhaustive. An act may amount to an attempt to murder, under Sec. 511 coupled with Sec. 299, which does not satisfy all the requirements of Sec. 307: Indian Penal Code by Morgan and Macpherson, p. 455. The law of England, as it stood at the time of the framing of the Code, does not govern the case, for that may be an attempt under Sec. 511 which is not one at home: see *illustration (b)*, and compare *Reg. v. Collins. (a)* Then as to the word ‘loaded rifle,’ the Court will not adopt the strict construction that formerly prevailed in courts in England; but even if they should do so, these words, as expressive only of the means, may be rejected as surplusage: *R. v. Jones. (b)*

(a) 33 Law J., M. C., 177.

(b) 2 B. & Ad. 611.

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[WESTROPP, J. :—Another difficulty arises in my mind from the use of the words : “ knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being.” How can it be said that he knew it to be so imminently dangerous, &c., when there was no cap upon the gun ?]

[COUCH, C.J. :—The difficulty may perhaps be removed by incorporating the 300th section. It may be said that the nature of the murder attempted to be committed is here defined ; and that the prisoner is charged with the attempt to commit that murder.]

The difficulty is got rid of in the manner pointed out by the Chief Justice ; or these words may also be rejected as surplusage. The charge stands, then, as one of a simple attempt to murder ; and the presenting of the loaded gun under the circumstances is plainly, in the words of the section, an act done towards the commission of the offence. *R. v. Gill* (c) ; *Reg. v. McPherson* (d) ; *Schofield's Case* (e). 1 Russell on Crimes, 4th Edn., pp. 83 and 975-981 ; 2 East. P. C. 1028 ; 7 Wm. IV. & 1 Vict., c. 95, s. 4 ; 24 & 25 Vict., c. 100, ss. 7, 14, and 19 ; and Indian Penal Code, Sec. 33, were also cited.

*Taylor*, for the prisoner, was requested to confine his argument to the 3rd and subsequent heads of charge. The only act complained of is the presenting an uncapped gun, a perfectly harmless instrument, at the Drum-Major. This is not an attempt to commit murder or any other crime. The English decisions show that clearly. “ Presenting a gun is not enough,” says *Pattison*, J., in *Reg. v. Lewis*. (f) See too *Reg. v. St. George* (g) and *Reg. v. Baker*. (h) In fact, the legal crime is not complete until the prisoner has done an act which he cannot recal, until he has left himself no *locus penitentiae*. It may be that he would not have pulled the trigger ; and we must assume everything in his favour, certainly nothing against him. This reasoning applies to the 4th and 5th counts, as well as to the 3rd. The word

(c) 2 B. & Ald. 204. (d) I. Dears. & B., C. C., 197. (e) Cald. 400.

(f) 9 C. & P. 523. (g) 9 C. & P. 483. (h) 1 C. & K. 254.

“ loaded” vitiates the 3rd count. That means “ completely loaded”—*R. v. Carr* (*i*) ; *R. v. Harris* (*j*) ; *Reg. v. James* (*k*) ; *Reg. v. Baker* (*suprà*). It was contended that portions of the 3rd head were surplusage, and might be rejected as such ; but that rule must be confined to cases where the words rejected are not essential: *R. v. Ryan* (*l*) ; and Starkie on Evidence, Vol. I., p. 398. There the words are essential. The prosecution must prove them, or, if they do not, the prisoner is entitled to an acquittal.

*The Advocate General* was heard in reply. He cited Indian Penal Code by Morgan and Macpherson, pp. 278 and 355 ; *Osborn v. Veitch.* (*m*)

*Cur. adv. vult.*

COUCH, C.J. (after stating the questions that had been put to the jury, and their answers to them, proceeded):—Upon these findings I am of opinion that a verdict of guilty ought to be entered upon the 3rd head of charge.

The first two heads are framed under Sec. 307. The words of that section are:—“ Whoever does any act with such intention or knowledge, and *under such circumstances*, that if he by that act caused death he would be guilty of murder, shall be punished,” &c. Now it appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things ; and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section.

The illustrations given bear out this view. One is that of a man firing a loaded gun ; and another is that of a man placing food mixed with poison on another’s table. Both these acts are capable of causing death : but in the present

(*i*) R. & R. 377.

(*j*) 5 C. & P. 159.

(*k*) 1 C. & K. 530.

(*l*) 2 Mood. C.C. 15.

(*m*) 1 F. & F. 317.

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case, although the act was done with the intention of causing death, and was likely in the belief of the prisoner to cause death; yet in point of fact it could not have caused death, and it, therefore, does not come within that section.

As to the 3rd head of charge, it was pointed out in the course of the argument that, if the whole of the averments are necessary to be proved, the facts found are not sufficient; for the act done was not so imminently dangerous, that it must in all probability have caused the death of a human being, the jury having found that the gun could not be discharged, owing to there having been no cap upon the nipple. Then there is the difficulty occasioned by the words "loaded rifle;" and if we follow the decisions of the courts at home, we must hold that in this case the rifle was not loaded. I must say that I am not disposed to hold that the rifle in this instance, though without a cap, was not loaded within the meaning of the averment. I should rather be disposed, considering that the Legislature at home has passed an Act (*n*) declaring that a gun shall be deemed to be loaded though there is no cap upon it, to put the natural construction on the term, and to hold that the gun in this case was loaded. It is not, however, necessary for me to come to that conclusion. Then also as regards the first part of the charge, it might perhaps be read, not as describing the act of the prisoner, but as describing the nature of the murder he attempted to commit. It is not, in my opinion, necessary to discuss that either; for the conclusion I have arrived at is, that these are averments not necessary to be made; that it would have been sufficient to charge the prisoner simply with an attempt to murder; and that these averments, being unnecessary, may be rejected as surplusage. In support of this I need only refer to the case of *R. v. Briggs* (*o*) as an authority to show that even in the courts in England, where indictments are more strictly construed than they are here, such averments as these may be regarded as surplusage, and as such be rejected.

(*n*) 24 & 25 Vict., c. 100, s. 19.    (*o*) 1 Mood. C. C. 319.

What we have, therefore, to consider is, whether upon the findings of the jury the prisoner has been guilty of an attempt to murder within Sec. 511 taken in conjunction with Secs. 299 and 300 of the Penal Code. The words of Sec. 511 are: "Whoever attempts to commit an offence punishable by this Code \*\*\* and in such attempt does any act towards the commission of the offence, shall be punished." Now the jury have found that the prisoner presented the gun at the Drum-Major with intent to murder him. There was, therefore, the intent and the belief of the prisoner that the gun was capable of effecting his purpose. And it appears to me that the presenting of the gun, under these circumstances, was an act of such an approximate nature as to bring the prisoner within the words of Sec. 511. The requirements of the section are,—the intent, and an act done towards the commission of the offence. Supposing the gun was capped,—loaded in the strict sense of the term —no one could for a moment doubt that presenting it at the Drum-Major with the intention of murdering him would be an act done by the prisoner towards the commission of the offence, bringing him within the terms of Sec. 511. Then the fact of there being no cap upon the nipple does not make any difference under this section, if there is the intent and belief before referred to, and the absence of knowledge that the gun is uncapped. The illustrations show that the circumstance that it is not possible to complete the offence makes no difference as regards the attempt. They are both cases in which an attempt to commit the offence could not have been successful. Looking, therefore, at the words of Sec. 511 and the illustrations to it, I am of opinion that the prisoner may properly, upon the findings of the jury, be convicted of an attempt to murder ; and that a verdict of *guilty* should be entered upon the 3rd head of charge.

A case cited before us in the course of the argument, that of *Reg. v. Collins (ubi supra)*, appeared to show that in this latter respect there was an inconsistency between the English Law and the Indian Penal Code. I was surprised by this seeming inconsistency ; but when the case came to be

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examined, it appears not to exist. Mr. Greaves has pointed out the grounds of the decision in that case in his last edition of *Russell on Crimes*, Vol. III., p. 643; and shows that the decision was come to in consequence of the form of the indictment, which was framed upon an Act which made the attempt to thieve a statutable offence. If the prisoner in that case had been indicted for the Common Law offence or misdemeanour of attempting to commit theft, although under the circumstances the offence could not be completed, the result would have been different; for the Common Law of England in this respect agrees with the law as passed for India and embodied in the Penal Code.

It is unnecessary for me to consider the remaining heads of charge. The sentence to be passed upon the 3rd head will be sufficient for the purposes of justice.

WESTROPP, J. :—I fully concur in the observations of the Chief Justice on the 1st and 2nd heads of charge; and in thinking that upon the findings of the jury these charges are not sustainable. The facts do not bring the case within the 307th section.

The form of the 3rd head of charge interposed difficulties; and the allegations which caused the difficulties are these:—“Knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being.” As there was no cap upon the gun, that part of the charge was not sustained. Then as to the “loaded rifle,” upon the question, whether the evidence in this case would satisfy the words of that allegation I express no opinion, nor is it necessary to do so; for the case of *R. v. Briggs* enables us to discard these allegations as surplusage.

Discarding these two allegations, the charge stands simply as an attempt to murder; and then arises the question, whether the facts proved bring it within Sec. 511 coupled with Secs. 299 and 300. I agree with the observations of Macpherson, J., and Morgan, J., in their edition of the Penal Code, that that may be an attempt under Sec. 511 which does not come within Sec. 307; and upon the whole

it seems to me that the presenting the gun in this case, loaded as it was with powder and ball, and being in the belief of the prisoner capable of being discharged—for he was under the impression that the gun was capped—was an act sufficiently approximate to the commission of the offence to bring it within Sec. 511.

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I have not arrived at this conclusion without difficulty, but I believe it to be consistent with common sense, and that Sec. 307 was not intended to exhaust all attempts to commit murder which should be punishable under the Code. I wish also to express my concurrence in the remarks of the Chief Justice in respect to the case of *Reg. v. Collins*.

Upon the other charges it is unnecessary to express an opinion.

Verdict of *Guilty* entered upon the 3rd head of charge.

REG. v. GANU bin KRISHNA' GURAV and others.

March 6.

*Obscene Songs—Lávni—Ind. Pen. Code, Sec. 294—Crim. Proc. Code, Secs. 66, 257, and 265.*

On a reference by a Session Judge, convictions and sentences by a Magistrate F. P., reversed, as the record of the case did not disclose that the accused had committed any offence.

GANU and four others appealed to the Court of Session at Tháná, from an order of Rámchandra Amrit Dugal, Magistrate F. P. at Ratnágiri, dated the 13th of October 1866, by which they were convicted, under Sec. 294 of the Penal Code, of singing obscene songs in a public place to the annoyance of others, and sentenced, No. 1 to pay a fine of Rs. 5, and Nos. 2, 3, 4, and 5 to pay each Rs. 3; and in default to suffer No. 1 five days', and Nos. 2, 3, 4, and 5 each three days' simple imprisonment.

The record and proceedings were referred for the orders of the High Court, on the 9th of February 1867, by R. H. Pinhey, Session Judge of the Konkan, with the following remarks :—

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" I am of opinion that the conviction and sentence recorded by the Magistrate F. P. in this case must be reversed, both by reason of the illegal procedure of the Magistrate, and also because, as a matter of fact, the record of the case does not disclose that the accused committed any offence whatsoever.

" (1) As to the Magistrate's procedure. The accused are convicted of having sung obscene songs in a public place (a temple) to the annoyance of others—an offence punishable under Sec. 294 of the Indian Penal Code. The accused were arrested without warrant by the police, on the complaint of Mahádev Diakar Joshi made before the Foujdár at Ratnágirí. As persons charged with an offence punishable under Sec. 294 may be arrested without a warrant, the police committed no illegality. The complaint of Mahádev Dinkar Joshi, being preferred to the police only, might have been oral. It was, however, made in writing. There is no harm in this. But the written complaint is worth no more than an oral complaint would have been, so far as the ulterior proceedings of the Magistrate are concerned. The complaint was not, of course, sworn to before the Foujdár; nor was it afterwards verified on solemn affirmation before the Magistrate, to whom the accused were sent by the Foujdár. The Magistrate, on getting the accused before him, indorsed the written complaint, preferred before the Foujdár, to the effect that the substance of this complaint had been stated to the accused; that the accused admitted their guilt; and that they were, therefore, convicted and sentenced.

" Now the Magistrate clearly meant to proceed with this case under Sec. 265 of the Code of Criminal Procedure. This section provides for the summary conviction of a person who, on having the substance of such a complaint as is referred to in this section stated to him, admits the truth of the complaint. But the complaint referred to in Sec. 265 is clearly a complaint such as is contemplated in Sec. 257 of the Code of Criminal Procedure—that is, a complaint, made before a Magistrate having jurisdiction, of an offence

punishable with imprisonment not exceeding six months. Again Sec. 257 must be read with Sec. 66 of the Code ; and this section does not appear to have been attended to at all in this case. As the Magistrate did not examine the complainant on solemn affirmation, and had no sworn information before him at all, it appears to me that his summary procedure, under Sec. 265 of the Code of Criminal Procedure, was illegal (a).

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“(2) But if no notice be taken of the procedure of the Magistrate, still the conviction and sentence recorded by the Magistrate cannot stand : for the record of the case discloses no offence. Supposing the complaint of Mahádev Dinkar Joshi be taken as a well-received complaint, sworn to before the Magistrate, what does it say ? It says that some ‘tumásawa Gurav’ (not named) had dressed up some boys in women’s clothes, and that some ‘tamásgrí lok’—(still not named) had been repeating *lávnyá*. Now a *lávni* is not necessarily an obscene song. It may be obscene, and often is obscene ; and if the Magistrate had examined the complainant, as he ought to have done, on solemn affirmation, perhaps he might have elicited that the particular *lávnyá* referred to in the complaint were obscene. \* \* \* In Molesworth’s Maráthi Dictionary the meaning of the word *lávni* is given as ‘a song of a particular kind (sung generally by women) ;’ and there are numbers of *lávnyá* in the Selections from the Maráthi Poets published by Ráv Sáheb Bháskar Dámodhar in 1862, which, so far from being obscene, are considered almost sacred by the Maráthi people.”

PER CURIAM (Couch, C.J., and NEWTON, J.) :— The Court reverses the convictions and sentences, for the reasons stated in the latter portion of the remarks of the Session Judge.

(a) See next case.

In page 27 of Crown Cases—

In footnote, for “next case” insert “Reg. v.  
Dipchand Khushál, page 30.”

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July 17.

REG. v. KHUSHÁL HIRAMAN and INDRAGÍR.

*Leave to Prosecute—Civil Court—Act XXV. of 1861, Secs. 169 and 170—Lease—Copy of Lease—Valuable Security—Ind. Pen. Code, Sec. 30.*

The prosecutor applied to a Civil Court for leave to prosecute, *under Sec. 170 of the Crim. Proc. Code*, a witness who had appeared before the Court. The Court granted the permission *as applied for*.

The prisoner was tried for and convicted of an offence *coming under the provisions of Sec. 169* of the Crim. Proc. Code.

*Held* that the mention of Sec. 170 in the permission to prosecute granted by the Civil Court might be treated as surplusage, and that the prisoner was rightly convicted.

*Held also* that the copy of a lease is not "a valuable security" within the meaning of Sec. 30 of the Indian Penal Code.

BHOLA'GIR MANGIR brought a suit in the Court of the Principal Sadr Amín at Puná against the first prisoner to recover a certain piece of land near the Puná railway station. The first prisoner put in his answer, and stated that Bholágir could not recover the land, as he, the prisoner, held it under a perpetual lease granted to him by Bholágir himself. The alleged document creating the lease was then put in evidence; and Indragír, the second prisoner, gave evidence in support of its genuineness. Bholágir thereupon petitioned the Principal Sadr Amín for leave to prosecute the first prisoner, under the provisions of Sec. 170 of the Criminal Procedure Code; and in a postscript added that Indragír had given false evidence, and sought to prosecute him also. On the back of the petition the Principal Sadr Amín wrote that the permission was granted as sought for.

Thercupon the first prisoner was charged before E. T. Richardson, Magistrate F. P., with the offence "of using as genuine a document which he knew to be forged," under Sec. 471 of the Indian Penal Code; and the second prisoner was charged, under Sec. 109, with abetting that offence; and both were committed upon these charges to the Court of Sessions.

A. C. Watt, Acting Assistant Session Judge at Puná, tried the prisoners; and having amended the charge under

the provisions of Sec. 244 of the Criminal Procedure Code by adding, as against the second prisoner, the offence of giving false evidence ; and, as against both, the offences of fabricating false evidence and of corruptly using fabricated evidence under Secs. 193 and 196 of the Penal Code, convicted them of the same. The first prisoner was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 5,000, and in default of payment to suffer further rigorous imprisonment for six months ; and the second prisoner to suffer rigorous imprisonment for eighteen months and to pay a fine of Rs. 500, and in default of payment to suffer further rigorous imprisonment for six months.

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The appeal was argued before COUCH, C.J., and NEWTON, J.

*Marriott* (with him *Vishvanáth N. Mandlik*), for the prisoners, argued that as the document forged was a valuable security, and as the punishment for that offence, under Sec. 467 of the Indian Penal Code, was transportation for life, the case ought properly to have been tried before a jury, under the notification in the *Government Gazette* ; and that, that not having been done in this case, the proceedings ought to be quashed.

*Dhirajlál Mathurálás* (Government Pleader), for the prosecution, contended that the document in question was not a valuable security, as it was apparently a copy of a lease.

[COUCH, C. J. :—The document is a mere copy, and so it does not come under the term valuable security as defined in Soc. 30 of the Indian Penal Code.]

For the prisoners it was then argued that no proper sanction was given as required by law; the prosecution asked sanction to prosecute under Sec. 170 of the Criminal Procedure Code, which refers to Secs. 463, 471, 475, and 476 of the Penal Code, and does not refer to any of the sections under which the prisoners were convicted. The sanction ought to have been applied for and given under Sec. 169 of the Criminal Procedure Code ; and hence no sanction as required by law had been given in this case. Besides this, the evidence against the prisoners was very doubtful, and for these reasons the sentence ought to be set aside.

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et al.

Couch, C.J. :—We think the sanction given by the Principal Sadr A'min ought not to be limited by the mention of Sec. 170 in the application; we should rather treat the mention of the section as mere surplusage. Then as far as the evidence against the first prisoner is concerned, his guilt is proved beyond doubt. But with regard to the second prisoner, I think there is some doubt, though the case looks very suspicious, and that, under the circumstances, we should reverse the sentence against him, and reject the petition of the first prisoner.

*Petition of prisoner No. 1 rejected; and conviction and sentence against prisoner No. 2 reversed.*

July 24.

REG. v. DIPCHAND KHUSHAL.

*District Magistrate—Magistrate F. P.—Power to Refer—Jurisdiction—Crim. Proc. Code, Sec. 169.*

*Held* that the Magistrate of a District to whom a case has been sent for investigation by a Civil Court has no power to refer it to a Magistrate F. P., and the latter has, therefore, *under such circumstances*, no jurisdiction to take up the case without complaint made to him.

THIS case was referred for the orders of the High Court, by R. H. Pinhey, Session Judge of the Konkan, under the provisions of Sec. 434 of the Criminal Procedure Code.

The facts of the case, and the grounds of submitting it to the High Court, will appear from the following extracts of the Session Judge's judgment recorded in it:—

“On examining the record and proceedings of the F. P. Magistrate, however, I find that his proceedings were illegal *ab initio*. The case was commenced by A'zam Amrit Shri-pat Nágpurkar, Munsif at Dápoli, on the 25th of March 1867, writing a yál or Maráthi letter to Mr. Boswell, Magistrate of the Ratnágiri District, requesting him to have the accused tried for an offence punishable under Sec. 209 of the Indian Penal Code. There would have been nothing wrong in Mr. Boswell commencing proceedings himself against the accused on this yál of the Munsif, because Mr. Boswell, as Magis-

trate of the District, is, under the provisions of Sec. 68 of the Code of Criminal Procedure, competent to take cognisance of offences without a complaint being made before him in the manner prescribed in Sec. 66. But Mr. Nairne, who is a Magistrate F. P., and neither the Magistrate of a district, nor the Magistrate in charge of a division of a district, cannot act under the provisions of Sec. 68, and can only take cognisance of offences on complaint being made before him, as contemplated in Sec. 66 of the Code of Criminal Procedure. In this case no complaint was ever made before the F. P. Magistrate, Mr. Nairne. On receiving the Munsif's *yád*, the District Magistrate referred the case for trial to the F. P. Magistrate, Mr. Nairne, whom he designated "First Assistant Magistrate." In this order of reference there was a double mistake. As a F. P. Magistrate is not subordinate to the District Magistrate, but to the Court of Session, the District Magistrate, Mr. Boswell, could not legally refer this case to the F. P. Magistrate, Mr. Nairne, for trial. The District Magistrate, Mr. Boswell, was also wrong in addressing the F. P. Magistrate, Mr. Nairne, as First Assistant Magistrate. The offices of Assistant Magistrate and Deputy Magistrate were abolished by Act XVII. of 1862; and the High Court has repeatedly ruled that these offices no longer exist. I have already pointed out this to the District Magistrate, Mr. Boswell. By ignoring the directions of the Court of Session and also of the High Court on this subject, and using a phrase which has no longer any legal significance, the District Magistrate has been led to treat the F. P. Magistrate, Mr. Nairne, as an assistant and subordinate of the District Magistrate, which he is not, and to make an illegal order of reference in this case, which appears to me to vitiate the whole trial before the F. P. Magistrate, Mr. Nairne."

The case came on for disposal this day, before COUCH, C.J., and NEWTON, J.

PER CURIAM:—The Court annuls the conviction and sentence passed upon the prisoner, on the ground that the Magistrate F. P. had no jurisdiction to try the case without a complaint, as it was not sent to him by the Munsif for

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In page 32 of Crown Cases—

Lines 4 and 5, for "preceding case" read "case of Reg. v. Ganu, *suprà*."

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investigation, and the Magistrate of the District, to whom the Munsif sent it, had no power to refer the case to him.

*Conviction and sentence annulled.*

The remarks of the Session Judge in this and the preceding case having given rise to a false impression in the mind of the Acting Magistrate F. P. of Kaládgí, the following letter was addressed, by order of the Chief Justice and Judges of the High Court, to the District Magistrate of Kaládgí, in reply to a letter sent by him :—

“ SIR,—I have the honour to acknowledge the receipt of your letter inquiring ‘ whether a Magistrate F. P. can try a case in which the accused had been legally arrested without a warrant.’

“ 2. In reply I am directed to inform you that the Honourable the Chief Justice and Judges of Her Majesty’s High Court of Judicature concur in your view of the question, and are of opinion that a Magistrate F. P. can, when an offender has been legally arrested without a warrant by the police, try the case himself.

“ 3. I am also directed to inform you that the passage in the judgment of the Session Judge of the Konkan referred to (a) must be read in connection with the case before Mr. Pinhey, and to that extent is correct.

“ 4. The order of the High Court in the case of *Reg. v. Dipchand Khushál* was that ‘ the Court annuls the conviction and sentence passed upon Dipchand Khushál, on the ground that the Magistrate F. P. had no jurisdiction to try the case without a complaint, as it was not sent to him by the Munsif for investigation, and the Magistrate of the District, to whom the Munsif sent it, had no power to refer the case to him.’

“ 5. The Court is not to be considered as adopting the judgment of the Court of Session, except so far as is expressed in its own order.”

(a) *Reg. v. Dipchand Khushál.*

REG. v. VISIVANATH DAULATRA V.

1867.  
Sept. 16.*District Magistrate—Magistrate F.P.—Reference—Jurisdiction—Crim. Proc. Code, Sec. 404.*

The case of a prisoner accused of the offence of attempting to cheat by personation was referred for trial by the District Magistrate to a Magistrate F. P., who, without a complaint being made to him, convicted and sentenced the prisoner.

The conviction and sentence were confirmed by the Session Judge.

On application to the High Court to annul the conviction, on the ground that the Magistrate F. P. had no jurisdiction to try the case, the Court refused the application, as the question of jurisdiction had not been raised before the Session Court.

THIS was an application to the High Court to send for the record and proceedings in this case, under their powers of extraordinary jurisdiction.

The prisoner was convicted of the offence of attempting to cheat by personation, and sentenced, under Secs. 419 and 511 of the Indian Penal Code, to six months' rigorous imprisonment and to pay a fine of Rs. 500, in default, to suffer further six months' rigorous imprisonment. This conviction was confirmed in appeal by the Session Court.

Nánábhái Haridás, for the prisoner, stated that this case was referred by the District Magistrate to a Magistrate F. P., and the latter, on that reference, without any complaint being laid before him, as required by law, convicted and sentenced the prisoner. He, therefore, applied that the conviction and sentence should be set aside, as the Magistrate F. P. had no jurisdiction to try the case on the reference by the District Magistrate, to whom he was not subordinate.

COUCH, C. J. :—The question as to want of jurisdiction cannot be raised now, not having been raised in the Session Court.

NEWTON, J., concurred.

*Petition rejected.*

1867.  
Oct. 9.REG. v. BAGU valad OWSARI *et al.*

*Subordinate Magistrate—Magistrate F. P.—Power to Refer—Jurisdiction—Crim. Proc. Code, Sec. 276.*

A Subordinate Magistrate has no power to refer a case, which he has not himself jurisdiction to try, to a Magistrate F. P.; and the latter has, therefore, *under such circumstances*, no jurisdiction to take up the case without a complaint being made to him.

THE prisoners were convicted, by M. B. Baker, Magistrate F. P. in the Khándesh District, of theft as servants, and sentenced each, under Sec. 381 of the Indian Penal Code, to sixmonths' rigorous imprisonment, on the case being referred to him by a Subordinate Magistrate of the First Class.

Against this, Muhamad valad Gokul Prasád, one of the accused, preferred an appeal to the Honorable G. A. Hobart, Session Judge of Khándesh, who recorded the following judgment:—

“I find that the case was forwarded to the Subordinate Magistrate, First Class, who, finding that he was not legally competent to try the case, referred it for trial to a Magistrate F. P., being other than the Magistrate of the District; and it was thereupon tried, and appellant and the other accused were convicted and sentenced by the Magistrate F. P. on that reference. It appears to me that the Magistrate who tried the case, no complaint having been made to him, and he being not otherwise at liberty to try it, had no jurisdiction in the case. I, therefore, annul the conviction and sentence, and direct the trial of the case by a court of competent jurisdiction, that is, the Magistrate of the District. The appellant is to be released.”

The Session Judge, being of opinion as above, referred the case for the orders of the High Court, under Sec. 434 of the Criminal Procedure Code, with reference to the conviction and sentence passed upon the said Bagu, who did not appeal to him.

The case came on for hearing this day before COUCH, C.J., 1867.  
and NEWTON, J.

PER CURIAM:—The Court annuls the conviction and sentence passed upon Bagu valad Owsari.

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*Conviction and sentence annulled.*

**REG. v. RANCHODDA'S NATHU'BHA'I.**

Nov. 14.

*Session Court—Informal Commitment—Magistrate F. P.—Reference.*

A Court of Session cannot treat as a nullity the commitment of a Magistrate F. P. on the ground that he investigated the case, and committed the prisoner, without a formal complaint being made to him, but should proceed with the trial in the usual course.

THIS case was referred for the orders of the High Court by C. G. Kemball, Session Judge of Súrat.

The facts appear from the following remarks of G. Ayerst, Assistant Session Judge:—

“ In this case, before the prisoner was arraigned, it was urged by the counsel for the defence that the case could not be proceeded with, as the same had been ‘improperly committed.’ The facts of the case in connection with this point are as follows:—This case was originally sent by the District Judge of Súrat to the Magistrate of the District for investigation. The latter, without proceeding in the matter himself, directed a Full Power Magistrate of the same zillá to investigate the same. The latter investigated the case, and committed the accused for trial to the Sessions Court. But that Magistrate had no jurisdiction whatever. The Magistrate of the District had no power to refer the case for trial to a Full Power Magistrate, who is, for all the purposes of the present case, an officer of equal authority with himself. That F. P. Magistrate, therefore, acted contrary to law in proceeding with a case of this nature, concerning which no complaint had been preferred before him, or no order received from the District Judge. On this point I refer to the orders of the High Court which have recently been given respecting a case of a similar nature, which was

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tried by a Full Power Magistrate of the Ratnágirí Zillá, the *Queen v. Dipchand Khushál* :—‘The Court annuls the conviction and sentence passed upon Dipchand Khushál, on the ground that the Full Power Magistrate had no jurisdiction to try the case without a complaint, as it was not sent to him by the Munsif for investigation ; and the Magistrate of the District had no power to refer the case to the Full Power Magistrate.’ Such being the order of the High Court upon this point, I am unable to entertain the plea urged by the Government Pleader,—viz., that the committal was merely irregular, and as such should be considered valid, according to the provisions of Sec. 439 of the Criminal Procedure Code. I hold, therefore, that the F. P. Magistrate acted contrary to law. Such being the case, I am unable to proceed further with a case improperly committed. The accused, Ranchoddás Nathúbhái, is ordered to be discharged.”

The case was considered this day by COUCH, C.J., and NEWTON, J.

COUCH, C.J. :—By Sec. 359 of the Code of Criminal Procedure, in order to give a Court of Session jurisdiction, it is only necessary that there should be a charge preferred by a Magistrate or other officer specially empowered to make commitments to such court. In this case, there was a charge made by a Magistrate so empowered, and the Court of Session had not the power, when the case came before it for trial, to treat it as a nullity, on the ground that the Magistrate of the District had not power to refer the case to the Magistrate F. P. ; but should have proceeded with the trial. This court has held in another case that a conviction by the Session Court is not invalidated by the committal having been made upon such a reference. We annul the order of the Assistant Session Judge, and direct him to proceed with the trial.

*Order annulled.*

## REG. V. JOM'A bin BA'LU.

1867.  
Aug. 15.*Refusal to perform work—Magistrate's order—Act XIII. of 1859, Sec. 2.*

An order of a Magistrate, passed under Sec. 2 of Act XIII. of 1859, "that the prisoner should work for a certain period, and in case he failed to do so should suffer rigorous imprisonment for one month," annulled as to the latter part, the Magistrate having no power to make that order until the failure had occurred and been proved before him.

THE prisoner was charged "with neglecting to perform work as a labourer on account of which he had received an advance of money," and being convicted of the same, under Sec. 2 of Act XIII. of 1859, was ordered by Vishṇu Moreshvar Bhide, Magistrate F. P. in the Tháná District, to work for nineteen months and twenty-one days at the distillery of Nasarvánji's Dhurp at Mora, and, in case he failed to do so, to suffer rigorous imprisonment for one month.

On a review of the Magistrate's monthly Criminal Return, the High Court sent for the record and proceedings in this case, under Sec. 404 of the Crim. Proc. Code.

PER CURIAM (COUCH, C. J., NEWTON and GIBBS, JJ.):—The Court annuls that part of the order which directs that in case of failure to do the work the person is to suffer rigorous imprisonment for one month, as the Magistrate has no power to make that order until the failure has occurred, and has been proved to his satisfaction.

## REG. V. NA'THA' MULA'.

Oct. 9.

*Fine—Refund.*

A prisoner was sentenced to imprisonment and fine, and in default of payment of the latter to a further term of imprisonment.

He paid a portion of the fine, but, that fact not having been communicated to the jailer, underwent the entire further term of imprisonment.

Held that, under these circumstances, the Court had no power to order the fine to be refunded.

THE prisoner was convicted, by the 1st Class Subordinate Magistrate at Muhamdábád, in the Khedá District, of dishonestly receiving stolen property, and was sentenced to

1867      six months' rigorous imprisonment and to pay a fine of  
 REG.      Rs. 25, or in default to suffer further rigorous imprisonment  
 v.      for one month.  
 NATHA'MULA'

The accused paid the sum of Rs. 22-1-11, in part payment of the fine inflicted ; but the Subordinate Magistrate failed to give a notice of the payment to the jailer, and the consequence was that the accused suffered the whole term of imprisonment awarded by the Subordinate Magistrate in commutation of the fine imposed.

The above being the case, G. W. Elliot, Acting Magistrate of Kheḍá, sent a letter to the High Court requesting its sanction to refund to the accused the portion of the fine recovered from him.

The case came on for disposal this day, before COUCH, C. J., and NEWTON, J.

PER CURIAM :—The Court has no power to order the fine to be refunded. Any necessary application should be made to the Government. The Subordinate Magistrate ought to see that the party does not suffer in consequence of his omission.

Dec. 5.

REG. v. BECHAR MA'VA'.

*Jurisdiction—Foreigner—Act XXV. of 1861, Sec. 31.*

Sec. 31 of the Crim. Proc. Code does not confer jurisdiction upon a Magistrate to try the subject of a foreign State for "receiving stolen property," when the offence of receiving such property has been committed outside the British territories.

THE accused was convicted, in September 1867, by M. H. Scott, holding the powers of a Subordinate Magistrate of the First Class in the Kheḍá District, of "having dishonestly retained or received stolen property, knowing or having reason to believe the same to be stolen property ;" and sentenced to suffer two months' rigorous imprisonment, under Sec. 411 of the Indian Penal Code.

The record and proceedings were referred for the orders of the court, under Sec. 434 of the Code of Criminal Proce-

dure, by G. W. Elliot, Acting Magistrate of Khédá, with \_\_\_\_\_  
 the following remarks :—

1867.  
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 v.  
 BECHAR  
 MA'VA'.

“ The prisoner, Bechar Mává, is an inhabitant of Kudal, a foreign State within the Mahi Kántá Agency, and the property was found there. There is nothing to show that it had been in the British territory, either as stolen property, or that it was stolen there ; and even if it were, Sec. 31 (a) of the Code of Criminal Procedure, quoted by the First Class Subordinate Magistrate in his memorandum of explanations, would not be so applicable as to justify his having tried a foreigner for an offence committed within his own territory.”

PER CURIAM (COUCH, C. J., and NEWTON, J.) :—The Court annuls the proceedings of the Subordinate Magistrate, First Class, for want of jurisdiction.

(a) “ If any person be charged with any offence punishable under Sections 411, 412, or 414 of the Indian Penal Code, under the head of ‘ the receiving of stolen property,’ such offence may be inquired into or determined in any District or Division of a District in which such person shall have, or shall have had, such stolen property in his possession, or in any District or Division of a District in which the offence by which such property came to be stolen property within the meaning of the said Code may be inquired into or determined.”



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An order of a Magistrate, passed under Sec. 2 of Act XIII. of 1859, "that the prisoner should work for a certain period, and in case he failed to do so should suffer rigorous imprisonment for one month," annulled as to the latter part, the Magistrate having no power to make that order until the failure had occurred and been proved before him. *Reg. v. Jomá bin Bálú.* CR.CA. 37

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**NO. II. OF 1866. A.C.J. 168**

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**NO. III. OF 1866, SEC. I., CL. 2—**

**Held** that the words "three miles" in Bombay Act No. III. of 1866, Sec. I., Cl. 2, must be construed as three miles measured in a straight line along the horizontal plane, that being the most convenient meaning of the words, and the most capable of being ascertained. *Reg. v. Bhikobá Vinobá and others* CR. CA. 9 SECs. 3 and 4. CR. CA. 9

**ACTS DONE IN PUBLIC CAPA-  
CITY.—See PUBLIC SERVANT.**

**ACTS OF PARLIAMENT. — See  
STATUTES.**

**ADJUSTMENT OF DECREE OUT  
OF COURT—**

**1. Held** that the rejection, under Sec. 206 of Act VIII. of 1859, of a defendant's objection, in a Mofussil Small Cause Court, to the execution of a decree, on the ground that it

had been adjusted out of court, did not bar his right to bring a suit against the execution creditor, to recover the thing alleged to have been given in satisfaction of the decree. *Gulawad Chandábhái v. Rahimtulla Jamálbhái*. A.C.J. 76

**2. K.,** an execution creditor of C., applied to the Court by which the decree was passed, and caused C. to be imprisoned under it. C. then entered into a compromise upon certain terms with K. for the adjustment of the decree, and K. thereupon, *but without certifying the terms of such adjustment to the Court*, petitioned for the release of C., who was accordingly released.

Subsequently K. again applied to the Court to compel satisfaction of the whole amount of the decree against C.

This application was opposed by C., on the ground that an adjustment of the decree had taken place between him and K. The Judge, however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court, under Sec. 206 of the Civil Proc. Code.

**Held**, that the Judge was in error; that it was the duty of K., on applying for the release of C., to certify the adjustment to the Court that it would be unjust to allow him to take advantage of his own omission to do so; and that, not having done so, the presumption against him was that the decree had been satisfied in full; but that, under the circumstances, it would be the most equitable course to

direct the Judge to inquire into the terms of the adjustment.

Case remanded for that purpose.  
*Chango valad Dudhá Mahájan v. Kálurám Náráyanlás.* A.C.J. 120

*See* CIV. PROC. CODE, SEC. 206.

#### ADMIRALTY JURISDICTION—

One who has sued for damages caused by a collision at sea, and out of the jurisdiction of the High Court, subjects himself to a cross-suit for damages caused by the same collision, although himself residing out of the jurisdiction of the Court.

An order rejecting, for want of jurisdiction, a plaint brought under such circumstances, was set aside on appeal; and the costs of the appeal ordered to be costs in the suit.  
*Bombay Coast and River Steam Nav. Co. v. Réné Heleux, Master of the Ship "Gabriel."* o.c.j. 149

#### ADOPTION—

1. It is now well-settled law that the adoption of a sister's son by a Hindú of the Vaishya caste is valid.  
*Ganpatrú Vireshvar et al. v. Vithobá Khandáppá et al.* A.C.J. 130
2. *Held* :—The adoption by a Hindú widow of an only son, if valid in every other respect, cannot be set aside by reason of the adopted being an only son of an advanced age.

An adoption by a widow has a retrospective effect, and relating back to the death of the deceased husband, entitles the adopted to succeed to his estate.

A document purporting to be a deed of adoption does not require to be stamped. *Ráje Vyankatrú Anand-*

*ráv Nimbálkar v. Jayavarántrú bin Malhárrú Rapadive.* A.C.J. 191

ADVERSE POSSESSION.—*See* LIMITATION, 3.

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AGENCY.—*See* JURISDICTION, 1.

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AGREEMENT BETWEEN MORTGAGOR AND MORTGAGEE.—*See* LEASE.

ALIENATION.—*See* INA'AM - I - ALTAMGHA'. SURVEY NUMBER.

AMBIGUITY. — — *See* SHERIFF'S POUNDAGE.

ANCESTRAL PROPERTY. — *See* PARTITION.

ANCIENT DOCUMENTS. — *See* BURDEN OF PROOF.

ANCIENT INSTRUMENT. — *See* SHERIFF'S POUNDAGE.

APOLLO BANDAR, ORIGIN OF NAME. o.c.j. 43

#### APPEAL—

By virtue of Sec. 11 of Act XXIII. of 1861, and the provisions of Sec. 204 of the Code of Civil Procedure, an appeal lies from an order passed in a matter between a judgment creditor and sureties on behalf of a judgment debtor for the performance of the decree. *Bhikájí Vithal Ambekar, Ex parte.* A.C.J. 119

*See* BOUNDARIES. EXECUTION OF DECREE. IRREGULAR PROCEDURE. RELATORS.

#### APPEAL, DISMISSAL OF—

The time allowed, by Sec. 347 of Act VIII. of 1859, within which to apply for the re-admission of an

appeal dismissed for default of prosecution, should not, where the appellant's pleader has died without his hearing of it, be counted as commencing, until the appellant has an opportunity of coming in under the provision of Reg. II. of 1827, Sec. LIV., Cl. 2. *Alikhán U'markhán, Ex parte.* A.C.J. 92

**ASSIGNMENT.**—See **PENSION**, 1.

**ATTACHMENT.**—See **PENSION**, 2, 3.

**ATTEMPT TO MURDER**—

In order to constitute the offence of attempt to murder under Sec. 307 of the Ind. Pen. Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events.

*Aliter* under Sec. 511 taken in connection with Secs. 299 and 300.

Therefore, where the prisoner presented an uncapped gun at E. G. (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger:—*Held* that he could not be convicted of an attempt to murder, upon a charge framed under Sec. 307 of the Indian Penal Code; but that, under the same circumstances, he might be convicted, upon a charge of simple attempt to murder framed under Sec. 511 in connection with Secs. 299 and 300.

Unnecessary allegations in a charge may be rejected as surplusage.

Apparent inconsistency between the English law, with reference to attempts, as laid down in *Reg. v. Collins*, and the provisions of the Indian Penal Code, explained. *Reg. v. Francis Cassidy.* C.R.C.A. 17

**AUCTIONEER.**—See **DEPOSIT**.

**AUCTION SALE**—

The inám village of Chandanpuri was sold by auction under a decree. The notice of sale stated that the sale would begin either at Maligám or at Chandanpuri, and be completed at Maligám.

*Held* that the notice of sale was sufficiently certain.

An auctioneer who sells under a decree has power to adjourn the sale from time to time (upon giving proper notice), but whether he does so or not is a matter in his own discretion.

The practice of Kárkúns reading aloud notices of liens on property about to be sold by auction is objectionable, but, in the absence of proof that the value of the property has been thereby deteriorated, it is not such an irregularity as will vitiate the sale. *Gorind Hari Válekar v. Bank of India; Bank of India v. Rógho Núráyan.* A.C.J. 164

**AUNGIER'S CONVENTION.**—See **IMMOVEABLE PROPERTY IN BOMBAY**.

**AUTHORITY.**—See **JURISDICTION**, 1.

**BAILMENT.**—See **LIMITATION**, 3.

**BALANCE OF ACCOUNT.**—See **JURISDICTION**, 1.

**BATTA, NON-PAYMENT OF.**—See **EXECUTION OF DECREE, APPLICATION FOR**.

**BHA'GDA'RI TENURE**—

In a suit brought by a *bhágdár*, or shareholder in a *bhágvár* village, to recover possession of a *gabhán*, or

building-site, and a *vádī*, or home-  
stead,—appurtenant to his *bhág*,—  
from a stranger, who had purchased  
at an auction sale a building erected  
on the *gabhn* by a third person with  
the *bhágdár's* consent :

*Held* (reversing the decision of the  
District Court) that the purchaser  
of the building had only acquired a  
right to remove the building ma-  
terials, and that he had no right, by  
reason of his having purchased the  
building, to continue, without the  
*bhágdár's* consent, in possession of  
the *gabhn* and *vádī*, which, by the  
Bhágdári Act, could not be alienated  
apart or separately from the *bhág*,  
or some recognised subdivision there-  
of. *Prájivan Govan v. Jaishankar  
Bhagván.* A.C.J. 46

#### BILL OF LADING—

The defendants, carriers between  
Hongkong and Bombay, by a con-  
dition annexed to their bill of lading,  
stipulated that they should not  
be responsible for damage to goods  
arising from insufficiency of pack-  
age.

The plaintiff shipped certain goods in  
the defendants' steamer in packages  
which, though in fact insufficient,  
were packages of the kind ordina-  
rily used for the conveyance of such  
goods from Hongkong to Bombay.

On their being landed in Bombay it  
was found that packages were more  
or less broken, and that the con-  
tents were in some instances injured,  
and had to a small extent escaped  
from the packages.

In an action brought to recover dam-  
ages in respect of such injury, it  
was held—

That evidence of mercantile usage or  
of custom would be admissible to  
show that the words *insufficiency of  
package* should not be taken in  
their ordinary sense, but as mean-  
ing insufficient according to a spe-  
cial custom of the China trade.

*Held*, also that evidence of these  
packages being ordinary China  
packages, and of such packages  
having been always carried by the  
defendants without objection, was  
not sufficient, in the absence of  
proof of negligence, to fix the de-  
fendants with liability for damage  
done to them, there being no proof  
that it had been the practice either  
of the defendants, or any other  
shipowners protected by a similar  
clause in their bill of lading, to make  
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#### BONA FIDE PROCEEDING WITHIN PRECEDING THREE YEARS. —See EXECUTION OF DECREE, APPLICATION FOR.

#### BONA FIDES.—See IRREGULARITY “NOT AFFECTING THE MERITS OF THE CASE.”

#### BOUNDARIES—

In a case where *boundaries* of land are  
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trict Judge has no power to entertain  
such an appeal. Appeal referred  
to the Collector under Act XVI.  
of 1838. *Náráyan Vyankátesh  
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a.c.j. 167

## BURDEN OF PROOF—

In a suit to prevent the defendants from obstructing the plaintiff in his enjoyment of the fruits of certain trees, which he claimed as heir of a person who purchased that right, the defendants denied the existence of the right, and alleged possession and enjoyment in themselves.

*Held* that the District Judge, in appeal, having found the possession and enjoyment to be in the defendants, was right in throwing upon the plaintiff the burden of proving his title to the trees or their produce.

Rule of Evidence with reference to ancient documents stated. *Láldás Rámdás v. Káshirám.* A.C.J. 60

*See HINDU' LAW, 2. IRREGULARITY "NOT AFFECTING THE MERITS OF THE CASE."*

## CANTONMENT MAGISTRATE—

A European British subject, not belonging to or connected with the army, who resides within a Cantonment, is amenable to the jurisdiction of a Cantonment Joint Magistrate, under Sec. 1. of Act III. of 1859.

Where a pleader resides within the limits of a cantonment and practises as a pleader within the jurisdiction of a Small Cause Court, both the Cantonment Magistrate and the Small Cause Court Judge have concurrent jurisdiction over him to the amounts respectively cognisable by them.—*Shápurji Jehángir v. Richard Morgan.*

A.C.J. 187

CAPIAS AD SATISFACIENDUM, WRIT OF. — *See SHERIFF'S POUNDAGE.*

## CAUSE OF ACTION "HEARD AND DETERMINED"—

A suit was brought in the Court of a Munsif, who gave judgment for the plaintiffs, but his decree was reversed by the District Judge, on the ground that the claim was improperly valued. A second suit, on the same cause of action, was then brought in the Court of the Munsif, who again decided for the plaintiffs; but his decree was reversed by the District Judge, on the ground that the suit was prohibited by Reg. II. of 1827, Sec. xxi. The High Court, on special appeal, reversed that decision, and remanded the suit; and the District Judge then threw out the claim, under Sec. 2 of Act VIII. of 1859, on the ground that the cause of action had already been heard and determined. In a second special appeal against this decision:—

*Held* that the plaintiffs were not precluded from presenting a fresh plaint in respect of the same cause of action; and that the case came within the spirit of Sec. 36 of Act VIII. of 1859; as, there being no express power given by the Code to reject a plaint after it had been registered by reason of the claim being improperly valued, the doing so ought to have only the same effect as if the plaint had been originally rejected.—*Dullabh Jogi et al. v. Náráyan Láku et al.*

A.C.J. 110

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CERTIFICATE OF ADMINISTRATION—

*Held* that where the Court, under Sec. 11 of Act XX. of 1864 (Minors' Act), directs a certificate of administration to the estate of a minor to be granted to the Collector of a district, such certificate must extend to the moveable as well as the immoveable estate of the minor. *Lakshmi bai v. Ganesh Antaji et al.* A.C.J. 129

CERTIFICATE OF HEIRSHIP—

A certificate of heirship granted under Reg. VIII. of 1827 is not *prima facie* evidence that the holder of it is the rightful heir of the deceased. The effect of such certificate is merely to give security to persons in possession of or indebted to the estate of the deceased in dealing with such holder as the legal representative of the deceased. *Shripat Ramchandra Kulkarni v. Vithoji valad Malharji Patil et al.* A.C.J. 178

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COMMENCEMENT OF SUIT—  
*Held* that for the purpose of refund of half stamp duty under Sec. 26 of Act X. of 1862, the hearing of a suit in a Small Cause Court commences when proof of the service of the summons is taken on the day

appointed for the hearing ; and where proof of the service of the summons has been previously taken, it must be considered as taken at the commencement of the proceedings on the day appointed for hearing. *Amîrîchand Jamnâdâs v. Magan Amthû.* — A.C.J. 176

**COMMISSION TO TAKE EVIDENCE.—*See JURISDICTION*, 1.**

**COMMITMENT, INFORMAL—**

A Court of Session cannot treat as a nullity the commitment of a Magistrate F. P. on the ground that he investigated the case, and committed the prisoner, without a formal complaint being made to him, but should proceed with the trial in the usual course. *Reg. v. Ranchoddâs Nathûbhâi.* CR. CA. 35

**COMPLAINT—**

A conviction and sentence by a Magistrate F. P. under the Railway Act reversed ; there being no complaint made before the Magistrate, as required by the Code of Criminal Procedure. *Reg. v. Larkins.* CR. CA. 4

*See REFER, POWER TO.*

**COMPROMISE.—*See PENSION*, 1.**

**CONCURRENT JURISDICTION.—*See CANTONMENT MAGISTRATE.***

**CONSENT OF HEIRS.—*See SURVEY NUMBER.***

**CONSTRUCTION.—*See ACT (BOMBAY) NO. III. OF 1866, SEC. I., CL. 2. INÂM-I-ALTAMGHâ'. PARTITION. SHERIFF'S POUNDAGE. WILL.***

**CONTRIBUTION.—*See MAINTENANCE*, 1.**

**CONVEYANCE.—*See DEPOSIT.***

CONVEYANCING AND TENURES IN BOMBAY.—*See* IMMOVEABLE PROPERTY IN BOMBAY.

CONVICTION ON SEVERAL CHARGES—

Where a person, though charged under two heads, was found guilty of what was substantially but one offence :—

*Held*, that it was improper for the Session Judge to record a conviction under two sections of the Indian Penal Code; and thereupon to award a punishment of two years' imprisonment in excess of what the law prescribed for the offence committed. *Reg. v. Zorá Karubeg.*  
CR. CA. 12

COOKE, HUMPHREY, TREATY OF.—*See* IMMOVEABLE PROPERTY IN BOMBAY. O.C.J. 33, 34, *et passim*.

COPARCENARY. — *See* PARTITION.  
COPY OF LEASE.—*See* LEAVE TO PROSECUTE BY CIVIL COURT.

CO-SHARERS.—*See* LIMITATION, 1.  
COSTS—

An improper exercise of discretion in awarding costs—against which a Regular Appeal would lie—is no ground for allowing a special appeal; unless the award is contrary to some particular law on the subject. *Amirsáheb Hafizullá v. Jamshedji Rustamji.* A.C.J. 41

*See* ADMIRALTY JURISDICTION.

COUNTER CLAIM.—*See* JURISDICTION, 1.

CREDITS BY AGREEMENT.—*See* JURISDICTION, 1.

CRIMINAL BREACH OF TRUST.—*See* CRIM. PROC. CODE, SEC. 404, 3; and SEC. 426.

CRIMINAL INTIMIDATION.—  
*See* CONVICTION ON SEVERAL CHARGES.

CRIMINAL MISAPPROPRIATION.—*See* CRIM. PROC. CODE, SEC. 404, 3.

CRIMINAL PROCEDURE CODE—  
SEC. 31.—*See* JURISDICTION, 3.  
SEC. 62. A.C.J. 154  
SEC. 66—

On a reference by a Session Judge, convictions and sentences by a Magistrate F. P., reversed, as the record of the case did not disclose that the accused had committed any offence. *Reg. v. Ganu bin Krishṇa Gurav.* CR. CA. 25

SEC. 68. CR. CA. 31

SEC. 131. A.C.J. 154

SEC. 163. CR. CA. 6, 7

SECS. 169 and 170.—*See* LEAVE TO PROSECUTE BY CIVIL COURT.

SEC. 244. CR. CA. 29

SEC. 257. CR. CA. 26, 27

SEC. 265.—*See* CRIM. PROC. CODE, SEC. 66.

SEC. 277—

On a reference by a District Magistrate, a sentence passed by a Magistrate F. P., in a case submitted to him by a Second Class Subordinate Magistrate, under Sec. 277 of the Crim. Proc. Code, annulled: as the Magistrate of the District alone had power to dispose of cases under that section. *Reg. v. Kuberio Ratno.* CR. CA. 8

SEC. 308. — *See* JUDICIAL PROCEEDING, 1.

SEC. 318.—*See* JUDICIAL PROCEEDING, 2.

SEC. 359. CR. CA. 36

## SEC. 404—

1. In a case referred by a District Magistrate, under Sec. 434 of the Crim. Proc. Code, on the ground that the sentence was illegal : because the charge should have been, under Sec. 324 of the Penal Code, for causing hurt by means of a heated substance, —an offence which the Second Class Subordinate Magistrate had no jurisdiction to try ; and not under Sec. 323, for causing hurt, of which offence the accused had been convicted :—

The Court passed no order ; as it did not think it right, under the circumstances of the case, to direct the re-trial of the accused on the proper charge. *Reg. v. Ambā kom Girsoji.*

CR.CA. 1

2. In a case referred by a District Magistrate, under Sec. 427 of the Crim. Proc. Code, on the ground that the charge should have been under Sec. 324 of the Penal Code —an offence not within the cognisance of a Second Class Subordinate Magistrate ; and not under Sec. 323 :—

The Court passed no order ; and remarked that the case should not have been referred under Sec. 427, which applies only to the Court of Session acting in appeal from a court subordinate to it. *Reg. v. Nabīji valad Vithoji.* CR.CA. 2

3. In a case referred by a District Magistrate, on the ground that the accused had been convicted, under Sec. 403 of the Penal Code, of dishonest misappropriation of property ; whereas the charge should have been, under Sec. 406, of criminal breach of trust—an offence not

within the cognisance of the Second Class Subordinate Magistrate, who passed the sentence :—

The Court annulled the conviction and sentence ; and directed the case to be tried before a proper court. *Reg. v. Ganu valad Rāmchandra.*

CR.CA. 3

See JUDICIAL PROCEEDING, 1, 2.  
CR.CA. 37

## SEC. 426—

On a reference by a District Magistrate under Sec. 434 of the Criminal Procedure Code, where the conviction by a Subordinate Magistrate was for cheating, when it should have been for criminal breach of trust, for which the punishment awarded was a legal one :—

*Held*, that there was no occasion for the Court to interfere with the conviction or sentence. *Reg. v. Bābāji bin Bhāi et al.* CR.CA. 16

SEC. 427.—See CRIM. PROC. CODE, SEC. 404, 2. CR. CA. 3

SEC. 434.—See ACT VI. OF 1864 (Whipping). CRIM. PROC. CODE, SEC. 404, 1. CRIM. PROC. CODE, SEC. 426. CR.CA. 4, 5, 6, 7, 8, 13, 30, 34, 38

SEC. 439. CR. CA. 36

CROSS-SUIT.—See ADMIRALTY JURISDICTION.

CUSTODY, DISCHARGE OF DEBTOR FROM.—See SHERIFF'S POUNDAGE.

CUSTOM.—See BILL OF LADING.

DAMAGES.—See ADMIRALTY JURISDICTION. PUBLIC ROAD.

DEATH OF PLEADER.—See APPEAL, DISMISSAL OF.

“DEBT LEVIED BY EXECUTION.”—See SHERIFF'S POUNDAGE.

DECREE.—*See JUDGMENT OF DISTRICT JUDGE.*

DECREE FOR DELIVERY OF LAND.—*See IRREGULAR PROCEDURE.*

DECREE, STAYING EXECUTION OF.—*See PENDENCY OF APPEAL.*

DEPOSIT.—

In a suit by a purchaser of immoveable property to recover a deposit, paid by him on account of the purchase-money to the auctioneer; the vendor having refused to convey to the purchaser, save by a deed, which should describe the premises by reference to another deed, not shown to the purchaser at the auction, and of the contents of which he had not then any notice :—

*Held* (1) that the purchaser was not bound to have tendered a conveyance engrossed to the vendor for execution, together with the residue of the purchase-money, before suing to recover the deposit; and (2) that the money, having been deposited with the auctioneer as a stakeholder, and being in his hands, the action to recover it lay against the auctioneer, and not against the vendor. *Es-saji Adamji v. Bhimji Purshotam.*

O.C.J. 125

DEPOSITORY.—*See LIMITATION, 3.*

DIHOTRA.—*See SILK.*

DIRECTORS.—*See PURCHASE ULTRA VIRES.*

DISCRETION.—*See COSTS. REVIEW.*

DISTRICT JUDGE.—*See JUDGMENT OF DISTRICT JUDGE.*

DISTRICT MAGISTRATE.—*See CRIM. PROC. CODE, SEC. 277. REFER, POWER TO, 1. REFERENCE.*

DISQUALIFICATION.—*See HINDU' LAW, 1.*

DISTRIBUTION, STATUTES OF O.C.J. 23

DOCTRINE OF MITA'KSHARA'.—*See PARTITION.*

DUMBNESS.—*See HINDU' LAW, 1.*

EMPHYTEUSIS.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

ENFEOFFMENT.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

ENGLISH LAW.—*See LIMITATION, 3.*  
ENGLISH LAW, INTRODUCTION OF, INTO INDIA.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

ERROR IN LAW.—*See IRREGULARITY "NOT AFFECTING THE MERITS OF THE CASE."*

ERROR OR DEFECT IN PROCEEDINGS.—*See CRIM. PROC. CODE, SEC. 426.*

ESTATE OF INHERITANCE.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

EUROPEAN BRITISH SUBJECT.—*See CANTONMENT MAGISTRATE.*

EVIDENCE.—*See CERTIFICATE OF HEIRSHIP.*

EVIDENCE OF CUSTOM, WHEN ADMISSIBLE.—*See BILL OF LADING.*

EVIDENCE, QUESTION OF.—*See SILK.*

EXAMINATION OF WITNESSES IN COURT OF FIRST INSTANCE.—*See IRREGULARITY "NOT AFFECTING THE MERITS OF THE CASE."*

EXECUTION.—*See APPEAL. SHERIFF'S POUNDAGE.*

EXECUTION OF DECREE—

The High Court should not, in the exercise of it; extraordinary powers, give an appeal in a case where the law provides none.

Nor should the Court, in the exercise of those powers, interfere when such interference would have the effect of working an injustice.

A District Judge has power to review an order passed by him on appeal, in an application in the execution of a decree. *Náriyánbhádi Lálbhádi v. Gargúkrishna Bálkrishna and another.* A.C.J. 87

*See CIV. PROC. CODE, SEC. 206. IRREGULAR PROCEDURE. MESNE PROFITS.*

#### EXECUTION OF DECREE, APPLICATION FOR—

A District Judge having held that an application to execute a decree did not prevent the operation of Sec. xx. of Act XIV. of 1859, it having been struck off because the applicant did not pay *battá* :—the High Court reversed the order, and directed the Judge to determine whether the former application to execute the decree was *boná fide*, notwithstanding *battá* was not paid. *Dalvi v. Lakshman Hari Pátíl.*

A.C.J. 86

#### EX PARTE HEARING—

*Held* that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant but not instructed to answer, or instructed not to answer at all, was an "*ex parte* hearing, and that no appeal lay from a judgment passed in such suit. *Bhimáchárya bin Vyankatáchárya v. Fakírúppá bin A'nand-áppá.*" A.C.J. 206

#### EXTRAORDINARY JURISDICTION.—*See JURISDICTION, 2.*

#### FAMILY CUSTOM

Evidence of the acts of a single family repugnant or antagonistic to the

general law will not establish a valid custom or usage enforceable in a Court of Justice.

*Tara Chand v. Reeb Ram* (3 Mad. H. C. Rep. 50) followed. *Mádhav-rúv Rághavendra v. Bálkrishna Rághavendra.* A.C.J. 113

#### FAMILY PROPERTY.—*See PARTITION.*

#### FEES.—*See SHERIFF'S POUNDAGE.*

#### FEUDAL TENURES.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

#### FINE.—*See REFUND.*

#### FORA'S, DERIVATION OF WORD.

O.C.J. 40

#### FORA'S LANDS.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

#### FOREIGNER.—*See JURISDICTION, 3.*

#### FREEHOLD OF INHERITANCE IN BOMBAY.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

#### FRESH PLAINT.—*See CAUSE OF ACTION "HEARD AND DETERMINED."*

#### GABHA'N.—*See BHA'GDA'RI TENURE.*

#### GA'IKWA'D.—*See JURISDICTION, 2.*

#### GIFT OF LAND—

*Held* that a gift of land is not complete, by Hindú law, without possession or receipt of rent by the donee. *Harjivan A'nandrám v. Náran Haribhádi.* A.C.J. 31

#### See PERMISSIVE OCCUPANCY.

#### GRANT OF LAND.—*See INÁM-I ALTAMGHA'.*

#### GUARDIAN.—*See MINOR.*

#### HEARING OF SUIT.—*See COMMENCEMENT OF SUIT.*

#### HEIRS, CONSENT OF.—*See LIMITATION, 2.*

#### HINDU' LAW—

1. Dumbness, if from birth, is a cause of disherison in females as well as in males.

A Hindú widow born dumb is, according to the law prevailing on this side of India, incapable of inheriting from her husband.

Such widow is, however, entitled to her *stridhan*, and to maintenance out of the property of her deceased husband.

Case remanded to have the widow made a party to the suit, that it might be determined whether she was born dumb, and if so, that the amount of her *stridhan* and of her maintenance might be ascertained. *Vallabhrám Shirnáráyán v. Bái Harigangá.* A.C.J. 135

2. By Hindú law, the burden of showing of what separate property consists, lies upon the person who alleges the property to be separate.

A person lending money on the security of the property of an undivided Hindú family, is bound to make inquiries as to the necessity that exists for such loan. If he lends the money after reasonable inquiry, and *bonâ fide* believing it will be properly expended, he is not bound to see to the application of it. The rule is the same whether all the members of the family are adults or minors.

Authorities bearing on the question of the *onus probandi* in such cases cited. *Gane Bhive Parab et al. v. Kane Bhive et al.* A.C.J. 169

*See ADOPTION, 1, 2. FAMILY CUSTOM. GIFT OF LAND. PARTITION. REGISTRATION, 5.*

**HINDU' WIDOW.**—*See HINDU' LAW, 1. INCONTINENCE. MAINTENANCE, 1, 2.*

**HUSBAND AND WIFE.**—*See LAND-LORD AND TENANT.*

**ILLEGAL ORDER.**—*See JUDICIAL PROCEEDING, 1.*

**IMMOVEABLE PROPERTY.**—*See DEPOSIT. LIMITATION, 3. MESNE PROFITS. SHERIFF'S SALE.*

**IMMOVEABLE PROPERTY IN BOMBAY**—

Immoveable property situated in the Island of Bombay conveyed in 1859, to N. and his wife (Pársis), their heirs, executors, administrators, and assigns, was subsequently mortgaged by N. and his wife, but the mortgagee did not enter into possession. Afterwards, in 1861, N. alone entered into an agreement with the plaintiffs to give them a lease of that property for five years, the plaintiffs being willing to accept that lease with such title as N. could confer:—*Held* that, notwithstanding the non-concurrence of the mortgagee and of N.'s wife, N. must specifically perform his agreement.

*Held* also that it was unnecessary, under such circumstances, to consider whether the estate of N. and his wife in the property were chattel real, or real estate: for, if it were chattel real, N., by his marital right, according to English Law (which in this case applied), might dispose, either wholly or in part, of her interest; and if the property were realty, the lease by N. would at all events bind her for the term of five years, if N. should so long live.

Assuming the property to be realty, *Sembé* that on N.'s death before the expiration of the term of five

years, the lease would, as against the wife surviving, be voidable only, and not void.

The non-concurrence of the mortgagee could not prevent the right of the plaintiffs to a specific performance by N. of the agreement, because N. should either himself redeem the mortgage, or permit the plaintiffs to do so.

The proposition, laid down by the Judge of the Division Court, that *all immovable property in Bombay was of the nature of chattel real, and that there was not any property of the nature of freehold or inheritance in that island*, disapproved of and denied, as being irreconcileable with Royal Charters, Acts of Parliament and of the Legislative Council of India, decisions of the Courts both in India and England, and the tenures of land and practice of conveyancers in Bombay.

The tenure of land in Bombay under the Portuguese was of a feudal character.

Creation and tenure of the ancient Manor of Mazagon described.

Doctrine that the fief of the Middle Ages has sprung from the Roman tenure in emphyteusis, mentioned.

Ceremonies of enfeoffment and livery of scisin in Bombay.

The nature and results of Governor Aungier's Convention stated; and the origin of "pension and tax" in Bombay traced.

Treaty of the 23rd of June 1661, between Charles II. and the King of Portugal, considered.

The treaty in 1664-65, by Mr. Humphrey Cook with the Viceroy of

Goa, was entered into without authorisation by the Crown of England or the Crown of Portugal,—was not ratified by either,—was expressly repudiated by the former, and never was of any force.

*Doe d. De Silveira v. Texeira*, 2 Mor. Dig. 250, observed upon.

*Lex Loci* Report of the Indian Law Commissioners, and the introduction of English law into India, discussed.

Distinction taken, with reference to the observations of Lord Kingsdown as to Calcutta in the *Advocate General v. Ranee Surnomoye Dossee* (9 Moo. Ind. App. 425, 426), between Bombay, which was held by the English in full sovereignty, and Calcutta, which was merely held by them as a factory.

Statement of the circumstances which led to the passing of Stat. 9 Geo. IV., c. 33 (Fergusson's Act), and also of those which led to the passing of Act IX. of 1837 (relating to the immoveable property of Pársis). *Naoroji Berdmji v. Rogers*.

O.C.J. 1

#### INAAM-I-ALTAMGHA'

A grant in inām-i-altamghá to N and his children, "and their descendants in lineal succession, for generation after generation, in perpetuity and for ever," which was unburdened with any condition as to prospective service, and free from any religious, charitable, or other trust, *Held* to confer an alienable estate.

Grants of land revenue for religious and charitable purposes, or for the future rendition of civil or military service to the State, considered, and

to some extent classified; and the enactments and authorities, historical and legal, relating to the question of their alienability, mentioned.

*Krishnaráv Ganesh v. Rangráv et al.* A.C.J. 1

INA'MDA'R—

An *inámdár's* to whom a village has been granted by Government, though bound to respect all existing tenant rights, is under no obligation to grant unoccupied lands in "*sutí*" or other permanent tenure, or to re-grant on the same tenure lapsed *sutí* lands; nor does the mere taking up of lands in such a village constitute the occupiers *sutí* tenants.

An *inámdár's* agent cannot, without express authority from his principal, grant lands on *sutí* or other permanent tenure.—*Nasarvánji Hor-masji et al v. Nárúyan Trimbak Pátíl et al.* A.C.J. 125

INCONTINENCE—

D., a Pardesi Hindú residing at Násik, died leaving two widows, B. and P. B., who was the first wife, though not incontinent, had been turned out of his house by her husband some time after he married P. by *pát*.

In a suit by B. to recover a moiety of D.'s estate, P., while admitting that she herself had been leading a life of prostitution since D.'s death, resisted a partition of his estate, on the grounds that B. had since D.'s death cohabited with M., and subsequently married with R.—both of which allegations B. denied:—

*Held*, that, though, by Hindú law, incontinence excluded a widow from

succession to her husband's estate, yet if the inheritance were once vested, it was not liable to be divested, unless her subsequent incontinence were accompanied by degradation; but that, by Act XXI. of 1850, deprivation of caste can no longer be recognised as working a forfeiture of any right or property, or affecting any right of inheritance.

*Held*, however, also, that if B. had duly remarried, she would cease to have any right to recover or hold any part of her late husband's property; and, as the District Judge, on appeal, had left the fact of B.'s remarriage unascertained, that his decree must be reversed, and the case remanded for a finding on that question. *Párvati v. Bhikú.*

A.C.J. 25

INDIAN PENAL CODE. A.C.J. 117

CR.CA. 24

SEC. 21. A.C.J. 95

SEC. 30.—See LEAVE TO PROSECUTE BY CIVIL COURT.

SEC. 33. CR. CA. 20

SEC. 75.

A prisoner convicted, under Sec. 380 of the Indian Penal Code, of theft in a building used for the custody of property, was sentenced, under Sec. 75, to fourteen years' transportation, as he had been previously convicted thirteen times of offences now punishable, under Chap. XVII. of the Code, with imprisonment for three years or upwards.

*Held* that, as all the previous convictions were prior to the passing of the Indian Penal Code, the present offence was not punishable under Sec. 75. *Reg v. Kushyá bin Yesu.*

CR. CA. 11

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|---------------------------------------------------------------------|-----------------|
| SEC. 109.                                                           | CR. CA. 28      |
| SECS. 193 and 196.                                                  | CR. CA. 29      |
| SEC. 209.                                                           | CR. CA. 30      |
| SEC. 228.— <i>See PREVARICATION. REFUSING TO ANSWER QUESTIONS.</i>  |                 |
| SEC. 294.                                                           | CR. CA. 25, 26  |
| SECS. 299, 300, and 307.— <i>See ATTEMPT TO MURDER.</i>             |                 |
| SECS. 323 and 324.— <i>See CRIM. PROC. CODE, SEC. 404, 1, 2.</i>    |                 |
| SEC. 380.— <i>See IND. PEN. CODE, SEC. 75.</i>                      |                 |
| SEC. 381.                                                           | CR. CA. 34      |
| SEC. 403.— <i>See CRIM. PROC. CODE, SEC. 404, 3.</i>                |                 |
| SEC. 405.                                                           | CR. CA. 16      |
| SEC. 406.— <i>See CRIM. PROC. CODE, SEC. 404, 3.</i>                |                 |
| SEC. 411.                                                           | CR. CA. 38, 39n |
| SECS. 412 and 414.                                                  | CR. CA. 39n     |
| SEC. 417.                                                           | CR. CA. 16      |
| SEC. 419.                                                           | CR. CA. 33      |
| SECS. 425 and 426.                                                  | CR. CA. 15      |
| SEC. 457.                                                           | CR. CA. 5       |
| SECS. 463 and 467.                                                  | CR. CA. 29      |
| SEC. 471.                                                           | CR. CA. 28, 29  |
| SECS. 475 and 476.                                                  | CR. CA. 22      |
| SECS. 506 and 507.                                                  | CR. CA. 19      |
| SEC. 511.— <i>See ATTEMPT TO MURDER.</i>                            | CR. CA. 33      |
| CHAP. XVII.— <i>See IND. PEN. CODE, SEC. 75.</i>                    |                 |
| INHERITANCE.— <i>See HINDU' LAW, 1.</i>                             |                 |
| INSUFFICIENCY OF PACKAGE.— <i>See BILL OF LADING.</i>               |                 |
| INTEREST.— <i>See LEASE. LIMITATION, 1.</i>                         |                 |
| IRREGULARITY.— <i>See AUCTION SALE. JUDGMENT OF DISTRICT JUDGE.</i> |                 |
| IRREGULARITY "NOT AFFECTING THE MERITS OF THE CASE"—                |                 |
| A suit, instituted in the Court of the                              |                 |

Principal Sadr Amín, was transferred, under Sec. 6 of Act VIII. of 1859, to the Court of the Munsif who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court, on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amín; and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif, upon evidence recorded by the Principal Sadr Amín; and that the *onus* of proving the *boni fides* of the transaction which was the subject-matter of the suit was thrown, by the District Judge, on the plaintiff, instead of on the defendant, who alleged the want of it:—

*Held* (1) That the Munsif's having used the evidence recorded by the Principal Sadr Amín, was only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case—the decree of the Munsif being in the plaintiff's favour—it was not a ground for reversing the decree on special appeal. (2) That the *onus* was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law; as the Judge did not hold that the defendant was entitled to succeed without

giving any evidence, unless the plaintiff disproved the allegation of the want of *bona fides*.

The meaning of Sec. 183, taken in connection with Sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself in the court of first instance, and not upon a perusal of depositions, except those taken under Sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing; and care should be taken, in the transfer of suits, and in the disposal generally of the business of the lower courts, to prevent the necessity of resummoning witnesses—*Náranbhái Vrijbhukandás v. Naroshankar Chandrosankar et al.* A.C.J. 98

#### IRREGULAR PROCEDURE—

On a complaint by a decree-holder, under Sec. 226 of the Civ. Proc. Code, against a mortgagee in possession of the land, and two other persons, who resisted the execution of the decree, the Munsif passed an order for delivery of possession, but without having numbered and registered the claim as a suit, as directed by Sec. 229 of the Code—which, in his opinion, did not apply to the claim of a mortgagee in possession; and the Senior Assistant Judge—though of opinion that the Munsif was in error in not proceeding under Sec. 229—ruled that there was no appeal from his order, as the claim had not been numbered and registered, and investigated as a suit:—

*Held* that the irregular procedure of

the Munsif should not prevent the Court from correcting his error; and that his order, which could only have been made under Sec. 229, was subject to appeal under Sec. 231, and should, therefore, be reversed, and the case remanded, that the claim might be numbered and registered as a suit, and an order passed thereon after due investigation, as directed by Sec. 229 of the Code. *Musabhi v. Shaunauddin Hismuddin et al.* A.C.J. 35

**JAHAGIRDA'R.** — See **LANDLORD AND TENANT.**

**JOINT ENJOYMENT.** — See **PARTITION.**

**JOINT LIABILITY.** — See **EXECUTION OF DECREE.**

**JOINT STOCK COMPANY.** — See **PURCHASE ULTRA VIRES.**

**JUDGMENT INTER PARTES WHEN CONCLUSIVE.** — See **PENDENCY OF APPEAL.**

**JUDGMENT OF DISTRICT JUDGE.**

*Held*, that a District Judge not writing a judgment containing the reasons for his decision, until after the decree in appeal was passed, did not affect the decision of the case on the merits, and was not a ground of special appeal. *Bhagvatsangji Jálamsangji v. Partásangji Ajjabhái; Ganpatrám Lakhmirám et al. v. Jaichand Talakchand.* A.C.J. 105

**JUDICIAL PROCEEDING—**

1. An order made by a Magistrate under Sec. 308 of Act XXV. of 1861 (Criminal Procedure Code) is not a judicial proceeding within the meaning of Sec. 404 of that Act.

A Magistrate who makes an illegal order, which purports to be made under Sec. 308 of Act XXV. of

1861, but is not made in accordance with the provisions of that section, is liable to be sued in the Civil Court in respect of such order, and to be restrained by injunction from carrying it into effect.—*Ashburner v. Keshav valad Tuku Pátil et al.* A.C.J. 150

2. *Held* that proceedings under Sec. 318 of the Crim. Proc. Code (Act XXV. of 1861) are judicial proceedings within the meaning of Sec. 404 of that Act, and that, therefore, the High Court has power to interfere with an order passed by a Magistrate under such section.

Under Sec. 318, a Magistrate is bound to inquire who is in actual possession, without regard to the question of who is legally entitled to possession, of the premises in dispute.—*Bápuji Jagjivan v. The Magistrate of Khedá.* A.C.J. 153

#### JURISDICTION—

1. The plaintiffs advanced Rs. 15,000 against the defendant's grain, consigned to Hongkong, to be there sold on his account by the plaintiffs' agents. The plaintiffs subsequently gave credit to the defendant for Rs. 14,115-3-3, alleged to have been received by them as the proceeds of the sale, and sued him for the balance in the Bombay Small Cause Court, abandoning the excess so as to bring the claim within the court's extended jurisdiction of Rs. 1,000. The defendant disputed the correctness of the account-sales forwarded by the agents at Hongkong, and contended that the court had no jurisdiction to try the case; and the Judge, subject to the opinion of the High Court upon the facts as

stated, struck the case out of the list for want of jurisdiction:—

*Held*, that as both the plaintiffs and the defendant were bound, by the nature of the transaction, to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant, the receipt by the plaintiffs of the amount, for which they gave credit in their particulars of demand, was in the nature of a part payment; and that the suit was, therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes. *Ewart, Latham, and Co. v. Háji Muhammad Siddik.* O.C.J. 133

2. In an action brought to recover a third-share of *arrears of a varshásan*, or annual allowance, paid by the *Gáikwád* of Barodá to the defendant, and in which the plaintiff alleged that he was entitled to a third-share:

*Held* that such an action can be maintained in a Munsif's Court, although it may be necessary to determine the title of the plaintiff to share in such *varshásan*.

*Sembé* that such an action is maintainable in a Court of Small Causes. Where the District Judge reversed the decree of the Munsif for want of jurisdiction, although the amount of the claim was under Rs. 500, the Court, in the exercise of its extraordinary jurisdiction, interfered.—*Ratanshankar Reváskankar v. Gulábshankar Láshankar.* A.C.J. 173

3. Sec. 31 of the Crim. Proc. Code does not confer jurisdiction upon a Magistrate to try the subject of a foreign State for "receiving stolen property," when the offence of

receiving such property has been committed outside the British territories. *Reg. v. Lechar Máká.*

CR. CA. 38

See ADMIRALTY JURISDICTION.

BOUNDARIES. CRIM. PROC. CODE, SEC. 404, 3. PUBLIC SERVANT. REFER, POWER TO, 1, 2. REFERENCE. TRESPASSES BY CATTLE.

JUS MARITI. — See IMMOVEABLE PROPERTY IN BOMBAY.

KHOTI ESTATE—

*Held*, that a Khoti estate is an estate paying revenue to Government upon which an assessment is temporarily settled, and that a suit for its recovery should be assessed at eight times the annual assessment, under Act XXVI. of 1867, Schedule B, Art. 11, note (i), Sp. Rule 1 for the Bombay Presidency. *Vithal alias Gopál Ganesh Bivalkar.*

A.C.J. 148

LANDLORD AND TENANT—

Upon the death of a tenant under a jahágirdár, his widow passed a kabuláyat, agreeing to hold the land on the same terms as her late husband; and that in the event of her marrying again, she should have no right to the holding, but that if she got her husband to live in her house, she might continue to hold the land. She afterwards remarried, and held the land till her death.

In an action brought by the second husband to recover possession of the land, as the heir of his wife:—

*Held* (reversing the decrees of both the courts below) that the plaintiff had no right to recover possession, as his wife had merely a personal interest in the holding, which ceased

upon her death. *Kamáluddin, Nawab Mir, v. Bhiká Mánji.*

A.C.J. 49

LA'VNI.—See CRIM. PROC. CODE, SEC. 66.

LEASE—

The provision contained in Act XXVIII. of 1855 that any rate of interest which the parties may have agreed upon shall be awarded, in no way prevents a Civil Court in India, which administers both law and equity, from examining into the character of agreements made between persons, such as mortgagor and mortgagee, trustee and *cestui que trust*, between whom relations exist, enabling one party to take advantage of the other, and from declining to enforce such agreements when they are shown to be unfair and extortionate. *Viná ak Sadáshiv Voze v. Rághi.*

A.C.J. 202

See LEAVE TO PROSECUTE BY CIVIL COURT.

LEASE, AGREEMENT FOR RENEWAL OF. — See IMMOVEABLE PROPERTY IN BOMBAY.

LEAVE TO PROSECUTE BY CIVIL COURT—

The prosecutor applied to a Civil Court for leave to prosecute, under Sec. 170 of the Crim. Proc. Code, a witness who had appeared before the Court. The Court granted the permission *as applied for*.

The prisoner was tried for and convicted of an offence *coming under the provisions of Sec. 169 of the Crim. Proc. Code.*

*Held* that the mention of Sec. 170 in the permission to prosecute granted by the Civil Court might be treated

as surplusage, and that the prisoner was rightly convicted.

*Held* also that the copy of a lease is not "a valuable security" within the meaning of Sec. 30 of the Indian Penal Code. *Reg. v. Khushál Hiráman and Indragír.* CR. CA. 28

LETTERS PATENT OF MAYOR'S, RECORDER'S, AND SUPREME COURTS, BOMBAY.—*See* SHERIFF'S POUNDAGE.

LETTERS PATENT OF THE HIGH COURT (AMENDED). O.C.J. 149; A.C.J. 145, 146; CR. CA. 18

LETTERS PATENT OF THE HIGH COURT (ORIGINAL). O.C.J. 149  
LEX LOCI REPORT.—*See* IMMOVEABLE PROPERTY IN BOMBAY. O.C.J. 17, 29, 66

LIFE ESTATE OF WIDOW IN IMMOVEABLES.—*See* PARTITION.

#### LIMITATION—

1. In a suit to establish a right to share in a watan, and to recover a portion of the profits thereof for seven years:—

*Held* that the case was governed, as to limitation, by Cl. 13 (and not Cl. 16) of Sec. 1. of Act XIV. of 1859; and that arrears for seven years were, therefore, properly awarded.

There is no law by which interest can be awarded in such a case. A volunteer, who acts as manager, cannot claim remuneration from his co-sharers without showing a previous consent on their part to pay him. *Gundo Anandráv et al. v. Krishnarúv Gorind.* A.C.J. 55

2. In a suit brought by a *mirásdár* to recover possession of *mirás* land, which his ancestor had resigned to Government, against a holder to

whom Government had subsequently granted it, *it was held* that the statute of limitations commenced to run against the *mirásdár* and his heirs from the time the *mirási* was resigned, and not from the date of the subsequent grant of it by Government.

To the validity of a resignation of *mirás* land by a *mirásdár* to Government the consent of his heirs is not requisite. *Arjuná valad Bhivá v. Bharán valad Nimbádi et al.* A.C.J. 133

3. About twenty-five years before suit brought, R. being possessed of a house, allowed K. to occupy it without paying rent, on condition that K. would keep it in repair, and restore it to R. on demand.

Nine years afterwards, and without any demand having been made by R., K. died, and his heirs continued to occupy the house, apparently on the same terms as K. had done.

In a suit brought by R. against the heirs of K. to recover possession of the house, it was held that K. could not be deemed to have been a depositary of the house within the meaning of Sec. 1., Cl. 15, of Act XIV. of 1859, and the case was, therefore, governed by Sec. 1., Cl. 12, of that Act.

*Held* also that K. occupied the house as tenant-at-will of R.; that such tenancy was not on the death of K., as of course, converted into an adverse occupation, by the heirs of K., in the absence of proof of the intention of the parties to that effect, and in the absence of anything to show that R. did not assent to the heirs of K. continuing

to hold on the same terms as K.  
had done. *Rádhábáí v. Shámá.*

A.C.J. 155

4. In a suit brought by the plaintiff to establish his right to a *todá garás* allowance, and for arrears of it, it was held that *todá garás*, in the absence of special proof to the contrary, must be presumed to be moveable property. A suit for its recovery must, therefore, be brought within six years: *Mahá-rána Fatesangji v. Desí Kalyan-ráya.* A.C.J. 189

*See EXECUTION OF DECREE, APPLICATION FOR. MINOR. PA'TÍ'LKÍ WATAN. PAUPER SUIT, 1. SURVEY NUMBER.*

LIVERY OF SEISIN IN BOMBAY.  
—*See IMMOVEABLE PROPERTY IN BOMBAY.*

LOADED RIFLE.—*See ATTEMPT TO MURDER.*

LOSS OF CASTE.—*See INCONTINENCE.*

MAGISTRATE.—*See JUDICIAL PROCEEDING, 1.*

MAGISTRATE F. P.—*See COMMITMENT, INFORMAL. COMPLAINT. CRIM. PROC. CODE, SEC. 277. REFER, POWER TO, 1,2. REFERENCE.*

MAGISTRATE'S ORDER.—*See ACT XIII. OF 1859, SEC. 2. JUDICIAL PROCEEDING, 2.*

MAINTENANCE—

1. A Hindú widow, who had been supported by her father-in-law, after his death sued his eldest son for maintenance, and obtained a decree for Rs. 150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed:—

*Held that, as this was a Small Cause Court suit, an appeal did not lie.*

The maintenance of a widow is, by Hindú law, a charge upon the whole estate, and, therefore, upon every part thereof.

The defendant might have the question raised by him decided, by suing his brothers for contribution. *Rámchandra Díkshít v. Savitribí.*

A.C.J. 73

2. *Held that a suit for maintenance by a Hindú widow is cognisable by a Court of Small Causes in the Mofussil. Juddál Mulji v. Hirá Mulji.* A.C.J. 75

MANAGER.—*See LIMITATION, 1.*

MANOR OF MAZAGON.—*See IMMOVEABLE PROPERTY IN BOMBAY.*

MANOR OF EAST GREENWICH.

O.C.J. 36, 46

MATERIAL ISSUES.—*See MISTAKE OF JUDGE.*

MAXIMS—

CAVEAT EMPTOR.—*See SHERIFF'S SALE.* A.C.J. 47, 115

EXPRESSIO UNIUS EXCLUSIO ALTERIUS. O.C.J. 39, 193

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS. A.C.J. 26

UT RES MAGIS VALEAT QUAM PEREAT. O.C.J. 161

MERCANTILE USAGE.—*See BILL OF LADING.*

MERITS.—*See JUDGMENT OF DISTRICT JUDGE.*

MESNE PROFITS—

Where a decree awarding possession of immoveable property is silent as to mesne profits accruing between the filing of the plaint and the execution of the decree, the Court executing the decree has no power to

award such ; the proper course for the plaintiff to adopt under such circumstances is to apply to the Court which passed the decree for a review, or else to file a separate suit. *Rádhíbáí v. Rádhíbáí.* A.C.J. 181

**MINOR—**

Where the father of a minor lent on account a sum of money to the defendant and died without having received back the money, and the account was continued with the defendant by the mother and guardian of the minor, and a balance was struck during the minority of the infant :—

*It was held that the cause of action arose at the time such balance was struck, and that, as the cause of action accrued to the minor during his disability, his representatives could sue to recover the balance at any time during the term of disability, and that a claim by the minor on attaining his majority, or, if he should die, by his representative, would not be barred if preferred within three years from the cessation of the disability. Further, the extension of the period of limitation conceded to a minor on account of legal disability, is not affected by the fact that during his minority he is represented by a guardian. *Mahipatráv Chandraráv v. Nensuk Anandráv Shet Marvádi.**

A.C.J. 199

*See CERTIFICATE OF ADMINISTRATION.*

**MIRA'SDA'R.** *See LIMITATION, 2.*

**MISCHIEF.** *See PUBLIC ROAD.*

**MISTAKE OF JUDGE—**

In a suit to redeem land alleged to have been purchased by the special

appellant at an auction sale, and then mortgaged by him to the respondents, the District Judge reversed the Munsif's decree for redemption—being under a mistake as to what was necessary to be proved with reference to the dimensions of the land ; and as the mistake was one which was likely to have affected his conclusions on other facts in dispute, and as other material questions had not been decided, the issues in the case were framed by the High Court, and the suit remanded for a new decree to be passed upon them. *Ajurán Manirám v. Kusaji valad Shekoji et al.*

A.C.J. 43

**MISTAKE OF MUNSIF.** — *See IRREGULAR PROCEDURE.*

**MORTGAGE.** — *See IMMOVEABLE PROPERTY IN BOMBAY. REGISTRATION, 1, 2, 3, 5.*

**MOVEABLE PROPERTY.** — *See LIMITATION, 4.*

**MUNICIPAL COMMISSIONER.** — *See PUBLIC SERVANT.*

**MURDER.** — *See ATTEMPT TO MURDER.*

**NEW TRIAL.** — *See CRIM. PROC. CODE, SEC. 404,3.*

**NON EST INVENTUS, RETURN OF.** O.C.J. 55

**NOTICE OF LIEN.** — *See AUCTION SALE.*

**NOTICE OF SALE.** — *See AUCTION SALE.*

**OBSCENE SONGS.** — *See CRIM. PROC. CODE, SEC. 66.*

**OBSTRUCTION BY MORTGAGEE IN POSSESSION.** — *See IRREGULAR PROCEDURE.*

**ONLY SON.** — *See ADOPTION, 2.*

**ONUS PROBANDI.** — *See BURDEN OF PROOF. HINDU' LAW, 2.*

**ORDER GRANTING REVIEW, FINAL.** — *See REVIEW.*

**PA'RSI LAW COMMISSION, REPORT OF.** o.c.j. 12, 99, 100

**PA'RSIS.** — *See IMMOVEABLE PROPERTY IN BOMBAY.*

**PART PAYMENT.** — *See JURISDICTION, 1.*

**PARTITION—**

V. and M., Hindús residing in Bombay, made a deed of partition, in 1823, of the whole of the family property, moveable and immoveable, which had come into their exclusive joint enjoyment on the death of their father. V. died in 1850, having made a Will prepared by an English solicitor, in the English language and form, by which, after various bequests to members of the family, he disposed of the residue of his estate: one third share to his son V. absolutely; another third to his son L. absolutely; “ and the remaining clear third share to my grandsons K., V., G., and N., the sons of my late son Morobá, deceased, their and each of their respective heirs, executors, administrators, and assigns, share and share alike.” These residuary bequests, it was provided, were not to take effect until after the death of the testator's widow, who was appointed executrix and manager of the whole estate during her life; but the estate was divided by the Award of arbitrators, in 1855, after making a provision for the widow, in substantial accordance with the directions of the Will, V. and L.

immediately thereafter took possession of their respective third shares of the moveable and immoveable estate; but the third share allotted to the four sons of M., who were all still infants, remained unapportioned until 1856, when, on a suit being filed, the greater part of the *moveable* property was apportioned. The *immoveable* property allotted to them remained unapportioned; and was managed first by the widow of M., till her death in 1855; then by his eldest son, K., till his death, without male issue, in 1859; then by the next eldest son, V., till his death, without issue, in 1864; and afterwards by the elder of the two surviving sons; and the proceeds were treated throughout as though the property was held in coparcenary by the four sons as a joint and undivided Hindú family.

In a suit brought by L., the widow of K., against K.'s surviving brothers and S., the widow of his brother V., in which L. claimed to be absolutely entitled as heir of her husband [and also as heir of her daughter, who died after her husband's death, childless and unmarried], to a fourth part of the third share of the estate allotted by the Award of 1855:—

*Held* (i) That the words “share and share alike,” occurring in the Will of V., ought not to be construed as necessarily constituting a tenancy-in-common, with all the incidents attached thereto, in English law; but that each of the four sons of M. took a separate share in the third of the testator's residuary estate;

the share of each son going, on his decease, to those who would, according to Hindú (and not according to English) law, be his heirs as a separated Hindú. (2) That, with regard to the immoveable property devised by the Will and allotted by the Award to the sons of M., there never was a *union* of estate—a coparcenary—from the commencement; and, consequently, there was no *Reunion* in the sense of the Hindú law, notwithstanding joint enjoyment and common residence; but only postponement for a time, and for purposes of convenience, of an apportionment of the estate, which was, accordingly (among other things), decreed. *Lakshmi bdi v. Ganpat Morobá et al.* o.c.j. 150

#### PA'TI'LKI WATAN—

Plaintiff—being entitled by an arrangement between the members of a family of pátíls, of whom he was one, to a third of the emoluments of the office of managing revenue and police pátíl—sued the defendant in possession to recover a third of a portion of the hereditary fields set apart as remuneration for the performance of the duties of the office; and the District Judge, in appeal, found his claim barred, on the ground solely that he had not for twelve years been in possession of the one-third which he claimed of the service land:—

*Held* that the suit must be remanded for re-trial; as it did not appear—having regard to Sec. 4 of Act XI. of 1843—whether the plaintiff's turn to officiate as pátíl, and his right to enjoy the land in dispute, and consequently the cause of action,

arose more than twelve years before the suit was brought. *Sinde v. Sinde.* A.C.J. 51

#### PAUPER SUIT—

1. *Held* that a pauper suit commences for the purpose of limitation on the day when the petition to sue *in formá pauperis* is presented to the Court, under Sec. 299 of the Code, and not on the day when—the application being granted—it is numbered and registered under Sec. 308. *Dharle v. Sámvat.* A.C.J. 39

2. *Held* that Sec. 301 of Act VIII. of 1859—requiring the petition for permission to sue *in formá pauperis* to be presented by the petitioner in person—is imperative; and must be held to control the provisions of Sec. 17 of the same Act. *Ex parte Dergir Gurú Sumbhágir.* A.C.J. 91

#### PAYMENT BY INSTALMENTS, ORDER FOR, SUBSEQUENT TO DECREE—

*Held* that, when the not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice, the court which passed the decree has power to review it, and to make an order for payment by instalments. Otherwise the court has no power to make such an order subsequent to the decree, without the consent of the judgment creditor. *Rari-chand Dalichand v. Motilál Nar-bherám.* A.C.J. 77

#### PENDENCY OF APPEAL—

*Held* that a former judgment, by a court of competent jurisdiction, upon the same cause of action, was

conclusive between the same parties, in a subsequent suit brought in another court, notwithstanding the pendency of an appeal against it; but that the Judge passing a decree in the subsequent suit might, upon application made to him, and security being given, stay the execution of it, until the appeal in the former suit was decided, and might, if the decree in the former suit was reversed, entertain an application for the review of his own decision in the subsequent suit. *Bulkirám Nathurám v. The Gujurát Mercantile Association, Limited, et al.*

A.C.J. 81

#### PENSION—

1. A pension having been granted by Government to B. P., in lieu of a *Saranjám* held by his grandfather, a claim to share the same by M. P. and his brothers was compromised, by B. P. agreeing to pay them a certain proportion thereof yearly. The Agent for Sardárs, affirming the decree of the Assistant Agent, found the agreement to be null and void, as an assignment of a future interest in a pension.

*Held*, that as the pension was not granted "in consideration of past services and present infirmities or old age," the case did not come within the terms of Act VI. of 1849; and that the agreement was a valid one. *Pánsé v. Pánsé.*

A.C.J. 62

2. On petition praying that an attachment placed on a pension, of which petitioner was the recipient, might be removed, under Act VI. of 1849, the High Court declined to interfere; as it had not been

shown that the pension was one enjoyed in consideration of past services and present infirmities or old age. *Vithalrúv Eshvantrúv, ex parte.*

A.C.J. 65

3. An order made by a District Judge, rejecting an application to attach a pension,—on the ground that, being a Political pension, it could not be attached, under Act VI. of 1849—was reversed, on petition, by the High Court, which directed the pension to be attached. *Harbhábin Rámchandrabbhat.*

A.C.J. 67

#### PERMISSIVE OCCUPANCY—

A donee, under a deed of gift, brought a suit to recover a piece of land which, he alleged, his donors had given for a temporary purpose to the defendant in possession six years before; and the Munsif found that it was so, and allowed the claim. But the District Judge, in appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree.

*Held* that the Judge was in error in requiring the plaintiff to establish the title of the donors, without inquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on that point. *Sákalchand Saválichand v. Dayúbhái Ichhúchand.*

A.C.J. 70

#### PERSONAL ATTENDANCE OF PARTIES. — *See* SMALL CAUSE COURT.

#### PETITION OF APPEAL—

Petitions of special appeal to the High Court at Bombay on its Appellate Side must be stamped according to

the scale contained in Cl. 11 of Schedule B of Act XXVI. of 1867.

*Deshí Kalyúnrái Hakumatríi et al., ex parte.* A.C.J. 145

PIGS.—See PUBLIC ROAD.

PLAINT, REJECTION OF.—See ADMIRALTY JURISDICTION.

PLEADER.—See EX PARTE HEARING. PORTUGUESE TREATY OF 1661.

—See IMMOVEABLE PROPERTY IN BOMBAY.

POSSESSION.—See BURDEN OF PROOF. GIFT OF LAND. REGISTRATION, 1,5.

POUNDAGE.—See SHERIFF'S POUNDAGE.

POWER OF HIGH COURT.—See EXECUTION OF DECREE.

PRACTICE.—See IRREGULAR PROCEDURE. SMALL CAUSE COURT.

PRESUMPTION.—See ADJUSTMENT OF DECREE OUT OF COURT, 2.

PREVARICATION—

*Held* that prevarication while giving evidence does not constitute the offence, under Sec. 228 of the Indian Penal Code, of intentionally causing interruption to a public servant sitting in a judicial proceeding. *Reg. v. Aubá bin Bhírúv.*

CR. CA. 6

PREVIOUS CONVICTION.—See ACT NO. VI. OF 1864 (*Whipping*). IND. PENAL CODE, SEC. 75.

PRIORITY.—See REGISTRATION, 1, 2, 5,

PROCEDURE.—See IRREGULAR PROCEDURE.

PUBLIC ROAD—

In the case of a conviction by a Subordinate Magistrate, under Sec. 18 of Act III. of 1857, of a person who, through neglect, permitted a public

road to be damaged, by allowing his pigs to trespass thereon :—

*Held*, on a reference by the District Magistrate, that the conviction was not illegal, because the land damaged was a public road ; as the right to use a public road is limited to the purposes for which the road is dedicated. *Reg. v. Linganá bin Giúbandé et al.* CR.CA. 14

PUBLIC SERVANT—

*Held*, that a Municipal Commissioner, appointed under Act XXVI. of 1850, is a public servant within the meaning of Reg. II. of 1827, Sec. XLIII. ; and that, consequently, a Munsif has no jurisdiction to try a suit brought against him for acts done in his public capacity. *Greaves et al v. Bhagrán Túlsí.*

A.C.J. 93

PUNISHMENT AFTER PREVIOUS CONVICTION.—See INDIAN PENAL CODE, SEC. 75.

PUNISHMENT IN EXCESS.—See CONVICTION ON SEVERAL CHARGES.

PURCHASE.—See REGISTRATION, 1,2. PURCHASE BY STRANGER OF BUILDING ERECTED ON GABA'HAN.—See BHA'GDA'RI TENURE.

PURCHASE ULTRA VIRES—

The purchase by the directors of a joint stock company, on behalf of the company, of shares in other joint stock companies, unless expressly authorised by the Memorandum of Association, is *ultra vires*.

A joint stock company, even though it be empowered by its Memorandum of Association to deal in the shares of other companies, is not thereby empowered to deal in its

own shares, and a purchase by the directors of the company of its own shares on behalf of the company is, therefore, under such circumstances, *ultra vires*.

A shareholder in a joint stock company can maintain an action against the directors of such company to compel them to restore to the company funds of the company that have by them been emp'oyed in transactions that the directors have no authority to enter into, without making the company a party to the suit.

Where a shareholder purchased shares in a joint stock company, knowing at the time that similar companies were in the habit of dealing in their own shares and those of other companies, and believing that the company in question adopted the same practice, but made no inquiry to ascertain whether or not such was the case, nor made any objection to such dealings of the company, until it was discovered they had resulted in loss, it was held that he had by his own conduct lost his right to hold the directors personally liable in respect of such dealing, and the result was held to be the same whether the said shareholder was beneficially entitled to his shares, or merely a trustee of them for others. *Jehangir Rastamji Modi v. Shambji Ladhu et al.*

O.C.J. 185

**RAILWAY ACT.**—See COMPLAINT.

**RA'ZI'NA'MA'.**—See LIMITATION, 2.

**RE-ADMISSION.**—See APPEAL, DISMISSAL OF.

**REAL ESTATE.**—See IMMOVEABLE PROPERTY IN BOMBAY.

**REASONS FOR DECISION.**—See JUDGMENT OF DISTRICT JUDGE.  
REFER, POWER TO—

1. Held that the Magistrate of a District to whom a case has been sent for investigation by a Civil Court has no power to refer it to a Magistrate F. P., and the latter has, therefore, *under such circumstances*, no jurisdiction to take up the case without complaint made to him. *Reg. v. Dipchand Khushal.*

CR. CA. 30

2. A Subordinate Magistrate has no power to refer a case, which he has not himself jurisdiction to try, to a Magistrate F. P.; and the latter has, therefore, *under such circumstances*, no jurisdiction to take up a case without a complaint being made to him. *Reg. v. Bagu valad Owsuri et al.*

CR.CA. 34

#### REFERENCE—

The case of a prisoner accused of the offence of attempting to cheat by personation was referred for trial by the District Magistrate to a Magistrate F. P., who, without a complaint being made to him, convicted and sentenced the prisoner.

The conviction and sentence were confirmed by the Session Judge.

On application to the High Court to annul the conviction, on the ground that the Magistrate F. P. had no jurisdiction to try the case, the court refused the application, as the question of jurisdiction had not been raised before the Session Court. *Reg. v. Vishvanath Daulat-rāv.*

CR. CA. 33

*See COMMITMENT, INFORMAL. CRIM. PROC. CODE, SEC. 277.*

**REFUND—**

A prisoner was sentenced to imprisonment and fine, and in default of payment of the latter to a further term of imprisonment.

He paid a portion of the fine, but, that fact not having been communicated to the jailor, underwent the entire further term of imprisonment.

*Held* that, under these circumstances, the Court had no power to order the fine to be refunded. *Reg. v. Náthá Málá.* CR. CA. 37

**REFUSAL TO PERFORM WORK.—**

*See Act XIII. of 1859, SEC. 2.*

**REFUSING TO ANSWER QUESTIONS—**

*Held* that refusing or neglecting to return direct answers to questions does not constitute the offence, under Sec. 228 of the Ind. Pen. Code, of intentionally offering insult or causing interruption to a public servant sitting in a judicial proceeding. *Reg. v. Pándu bin Vithaji.* CR.CA. 7

**REGISTRATION—**

1. *Held* that a registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser. *Sundar Jugivan v. Gopál Eshvant.* A.C.J. 68

2. *Held* that an unregistered mortgage without possession is not valid against a purchaser with possession. *Ganpat Bojáshet v. Khandu Chágashet et al.* A.C.J. 69

3. In a suit against a principal and two sureties, to recover the amount advanced on a bond by which certain immoveable property was

mortgaged, one of the sureties appeared, and contended that he was discharged from his liability, in consequence of the plaintiff's neglect to have the bond registered :—

*Held* that the surety was discharged, as he could only be liable by virtue of the mortgage bond, which, being invalid for want of registration, could not be used against him.

The principal, however, might be sued as for money lent, if the loan could be proved by other evidence. *Shankar Bápú v. Vishnu Náráyan et al.*

A.C.J. 79

4. *Held* in a suit to compel registration under Act XVI. of 1864, Sec. 15, that where courts found that the requirements of Sec. 29 of the Act had not been complied with before the Registrar of Assurances, he was justified in refusing to register the deed. *Bhagén Jayarám v. Vithobá Gorind.* A.C.J. 140

5. H. and U. were mortgagees of one V. U.'s mortgage was prior in point of time and registered. H. and U. obtained each a decree against V. U.'s decree was prior; but H., having applied for execution sooner, was put into possession. U. subsequently applied for execution and dispossessed H.

*Held*, in a suit by H. against U. to recover possession of the mortgaged premises, that registration made U.'s mortgage complete, though he did not obtain possession of the mortgaged property at the time when the deed to him was executed, and that any subsequent disposition of the equity of redemption by the mortgagor would be subject to his

mortgage. *U'máji valad Maníji Pátil Dumále v. Hari Rámchandra Kulkarni.* A.C.J. 143

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REVIEW—

In a suit to recover land on a docu-  
ment described as a lease, Munsif  
M. decided that the document  
created a mortgage; and that the  
suit should be for redemption. In  
a subsequent suit to redeem, Munsif  
D. decided that the same docu-  
ment operated as a sale, and threw  
out the claim, which decision was  
affirmed by the District Judge in  
appeal. Plaintiff then applied to  
Munsif L. to review the decree of  
Munsif M. A review was granted,  
the claim re-heard, and plaintiff had  
judgment to recover the land as  
heir of his uncle, on the ground  
that his uncle's widow, who passed  
the document sued upon, had no  
right to alienate the land. This  
decree was affirmed by a new Dis-  
trict Judge.

*Held*, that though L.'s act in granting the review was of a very questionable character, his order thereon was final, under Sec. 378 of Act VIII. of 1859, and that the propriety of the order could not be inquired into on a special appeal from the decision passed after the review had been admitted. *Dhunká Derlá v. Hirá Rámlá*. A.C.J. 57

*See EXECUTION OF DECREE. PAYMENT BY INSTALMENTS. PENDENCY OF APPEAL.*

**ROYAL CHARTERS AND LETTERS PATENT.**—*See IMMOVEABLE PROPERTY IN BOMBAY.*

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**SALE BY AUCTION.**—*See DEPOSIT. SA'LSET.*—*See INA'MDA'R.*

**SEPARATE PROPERTY.**—*See HINDU' LAW*, 2.

**SESSION COURT.**—*See COMMITMENT, INFORMAL.*

**SET-OFF.**—*See JURISDICTION, L.*  
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**SHARES.**—*See PURCHASE ULTRA VIRES.*

**SHERIFF'S POUNDAGE**—

In a suit brought in the Bombay Court of Small Causes to recover Sheriff's poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, and under which the plaintiff, at the request of the defendants, arrested H., who applied to the High Court under Sec. 273 of Act VIII. of 1859, and was ordered to be discharged from

custody; the Judge found for the defendants with costs, subject to the opinion of the High Court.

*Held* (1) that the words “debt levied by execution” used in the Table of Fees for the Recorder's Conrt, and continued in the subsequent tables, being ambiguous, the rule applies that “if an instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction;” (2) that as the Sheriff is the officer of the court, and his fees are received under its authority, it was unnecessary to refer the case back to the Small Cause Court in order that evidence of usage might be taken; (3) that, having regard, as well to the usage and practice of the Supreme Court, as to the liability of the Sheriff at the time the old Tables of Fees were settled, the words used must be construed as entitling the Sheriff to poundage upon his executing a warrant for the arrest of a defendant in execution of a decree; and (4) that if the Sheriff's right accrues upon his executing the warrant, the subsequent discharge, by the court, of the defendant from custody ought not to divest him of it. *Vináyak Visudev v. Ritchie, Steuart, & Co.* O.C.J. 139

**SHERIFF'S SALE**—

In a sale of immoveable property made by a Civil Court in execution of a decree, there is no implied warranty by the execution creditor of the title of the judgment debtor—the maxim “*caveat emptor*” applying. *Dhondú Mathurádú*

*Nāik v. Rāmji rālod Hanmantā Kakaḍā.*

A.C.J. 114

[Great doubt is thrown upon this case by the decision in the *Bank of Hindustān, China, and Japan v. Premchand Roichand et al.*, decided on the 6th of August 1868, and to be reported.]

SILK—

Whether or not cotton fabrics bordered with silk, or having a portion of silk otherwise used in their manufacture, are "silks in a manufactured or unmanufactured state, wrought up or not wrought up with other materials," within the meaning of Act XVIII. of 1854, Sec. 10, is a question of fact, to be decided on the evidence, not a question of law, to be reserved for the opinion of the High Court, under Act IX. of 1850, Sec. 55 and Act XXVI. of 1864, Sec. 7.

*Brunt v. The Midland Railway Company* (33 L. J., Ex. 137) followed. *Sembé*: The proper test for a Judge to apply in such cases, is to determine whether or not the value of the silk wrought up with other materials is more than half the value of the fabric. If it be not, the fabric cannot be considered to be silk, within the meaning of the Act. *Lakhmidās Hirachand v. The G. L. P. R. Company*. O.C.J. 129

SISTER'S SON.—See ADOPTION, 1.

SMALL CAUSE COURT—

*Held* that Sec. 42 of Act IX. of 1850 does not necessitate the personal attendance of the plaintiff in court in the first instance; but that the plaintiff may appear by such other person as may, by the Rules of the Court, appear for a party in a cause

When, however, the personal attendance of the plaintiff appears to the Judge to be necessary for the proper investigation of the cause, he may require it; unless the case comes within the privilege given by Sec. 46 of the Act. *Nenbādi v. Haim Mus'ji and his wife, Dādi.*

O.C.J. 119

See ADJUSTMENT OF DECREE OUT OF COURT, L. CANTONMENT MAGISTRATE. JURISDICTION, L. 2. MAINTENANCE, L. 2. PAYMENT BY INSTALMENTS.

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SPECIFIC PERFORMANCE.—See IMMOVEABLE PROPERTY IN BOMBAY.

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**See** IMMOVEABLE PROPERTY IN BOMBAY.

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**SURPLUSAGE.**—*See* ATTEMPT TO MURDER. LEAVE TO PROSECUTE BY CIVIL COURT.

**SURVEY NUMBER.**—  
 There is no precedent for ruling that the holder of a Survey field is incompetent to resign it without the consent of his heirs. A point of limitation must be decided, though raised at any stage of the cause. *Darlatá bin Bhújangú et al. v. Beru bin Yádoji et al.* A.C.J. 197

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**TRESPASSES BY CATTLE**—  
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